No. 15601

United States
Court of Appeals
for the Ninth Circuit

EVERETT D. IVEY, Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-22-57

No. 15601

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

ALEXANDER, BACON AND MUNDHENK,
HERBERT CHAMBERLIN,

315 Montgomery Street,
San Francisco, California,

For Appellant.

BOYD AND TAYLOR,
M. K. TAYLOR,

350 Sansome Street,
San Francisco, California,

For Appellees.

In the United States District Court, Northern District of California, Southern Division

No. 35333—Civil

UNITED NATIONAL INDEMNITY COMPANY, a corporation; NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Plaintiffs,

vs.

EVERETT D. IVEY, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Defendants.

EXCERPT FROM DOCKET ENTRIES

1956

Mar. 20—Filed complaint—issued summons.

Apr. 25—Filed amendment to paragraph VII of the complaint.

May 3—Filed answer of Everett D. Ivey.

Nov. 8—Ord. case cont'd. to Nov. 29, 1956 for trial. (Harris)

Nov. 29—Ordered case assigned to Judge Roche for trial this date. (Harris)

Nov. 29—Court trial. Evidence and exhibits introduced and further trial continued to Dec. 3, 1956 at 10 a.m. (Roche)

Dec. 3—Further Court trial. Arguments heard, motion of plaintiff to strike, submitted. Memos. ordered filed 5-5-5 days and case continued to Dec. 18, 1956 for submission. (Roche)

1956

Dec. 21—Ordered case submitted. (Roche)

1957

Jan. 30—Filed order for entry of judgment for plaintiff as prayed. Counsel to present findings, conclusions & judgment pursuant to rule. (Roche)

Feb. 15—Filed proposed modifications to findings & conclusions by deft. Ivey

Mar. 4—Ordered after hearing, findings & conclusions of plaintiff amended as to 1, 7, 8, 9, 10, 11, 12, 13, 14 and 15 and approved on stipulation as to 2, 3, 4, 5 and 6. Counsel to present amended findings and conclusions. (Roche)

Mar. 6—Lodged findings & conclusions by plaintiff, pursuant to order of March 4, 1957.

12—Filed findings & conclusions. (Roche)

Mar. 12—Entered judgment—filed March 12, 1957—that United National Indemnity Co. policy #10122 and endorsements does not provide property damage liability insurance to Everett D. Ivey; judgment for plaintiffs United National Indemnity Co., a corp., National Fire Ins. Co. of Hartford, Connecticut and Transcontinental Ins. Co. vs. Everett D. Ivey on x-complaint. Plaintiffs to recover costs in sum $79.80. (Roche)

12—Mailed notices.

1957

Mar. 22—Filed motion of deft. for new trial.

27—Filed notice by deft. of hearing motion for new trial, April 3, 1957 before Judge Roche.

Apr. 3—Ordered after hearing, exparte motion of plaintiff and motion of deft. for new trial, continued to April 4, 1957 at 10 a.m. (Roche)

4—Hearing on motion to strike and for new trial. Arguments heard and further hearing continued to April 15, 1957. (Roche)

15—Ordered hearing on motion to strike and for new trial continued to April 16, 1957. (Roche)

15—Filed motion of plaintiff to strike from testimony.

16—Ordered after hearing motion for new trial denied and motion of plaintiff to strike from testimony granted. (Roche)

May 9—Filed reporter's transcript of proceedings of Nov. 29, 1956.

13—Filed notice of appeal by defendant.

13—Filed appeal bond in sum $250.00.

14—Mailed notices.

16—Filed appellant's designation of record on appeal.

[Title of District Court and Cause.]

COMPLAINT

Action for Declaratory Judgment

Plaintiffs for cause of action against defendants complain and allege:

I.

That at all times mentioned herein the plaintiffs were and now are corporations duly organized and existing under the laws of the States of New York and Connecticut as follows, to wit: United National Indemnity Company, a corporation, and Transcontinental Insurance Company, a corporation, were and are duly organized and existing under the laws of the State of New York; National Fire Insurance Company of Hartford Connecticut, a corporation, was and is duly organized and existing under the laws of the State of Connecticut. That all of said insurance companies are affiliated and are known as "National of Hartford Group", and their principal places of business is Hartford, Connecticut.

II.

That plaintiffs are engaged in the business of writing insurance, issuing insurance policies and entering into insurance contracts.

III.

That the defendant, Everett D. Ivey, is a citizen and resident of the State of California, Alameda County, and within the district and division of this Court. That the names of the defendants, Doe One

through Five are unknown to plaintiffs and are persons who might claim any rights or interest in insurance contract involved herein.

IV.

That the jurisdiction of this Court is dependent upon diversity of citizenship, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

V.

That the plaintiffs for a premium paid by the defendant, Ivey, did issue a certain insurance policy covering certain occurrences for the period of January 15, 1953 to January 15, 1954.

That said insurance policy was number L.G.P. 10122 of the United National Indemnity Company and National Fire Insurance Company of Hartford Connecticut, plaintiffs herein.

That said insurance policy was issued to cover certain bodily injury liability, automobile property damage and certain personal liability contingencies of the defendant, Everett D. Ivey. That a true copy of said insurance policy and endorsements is attached to this Complaint marked as Exhibit "A" and incorporated by reference hereunto.

That the defendant, Everett D. Ivey, is a physician and surgeon. That said defendant did purchase, lease or acquire certain real property near Willows, State of California, for the purposes of operating and maintaining a duck club, a commercial enter-

prise or business in that said defendant rented hunting and shooting rights to use said lands and appurtenances thereon to various persons for a valuable monetary consideration. That plaintiffs are informed and believe that said rentals or revenues received by said defendant were substantial and that during the year of 1953 said sums were in excess of $3,000.00.

That during the month of October 1953, said defendant, for the purpose of creating or maintaining a duck pond or lake on his said real property, permitted certain water to be conveyed through a certain ditch. That one Alpheus Brian did file and bring an action for damages against said defendant, Everett D. Ivey, claiming certain damages to a crop of rice as a result of flooding lands owned, leased or controlled by said Alpheus Brian. That said action was filed in the Superior Court of the State of California, County of Colusa, No. 10542 and damages to real property was prayed for in the sum of $33,000.00, and upon the trial of said action a judgment was obtained by the said Alpheus Brian against the defendant, Everett D. Ivey.

VII.

That there is an actual controversy between the plaintiffs and said defendant under the insurance policy contract, hereinbefore set forth, entitling plaintiffs, by virtue of the existence of such actual controversy to have declared the present existing rights, and other legal relations between the parties herein under said insurance contract; that said con-

troversy more particularly is that under said insurance contract the defendant has and does contend that the occurrence which was the subject matter of the action against him for damages to the rice crop (and heretofore more particularly set forth and described) and the judgment obtained in said action was and is an occurrence and activities arising out of the operation of a duck club for commercial gain (all as hereinbefore alleged) was a business or commercial operation not covered but excluded from coverage under said insurance contract or policy.

Wherefore, plaintiffs pray that a declaratory judgment decree be made and entered herein fixing, determining and declaring the rights, liabilities, duties, responsibilities and legal relations of the parties hereto; that the reciprocal rights and liabilities of the parties herein be declared and determined fully in accordance with the said policy of insurance, and the law in such case made and provided for costs, and such further and additional relief as shall seem just and proper in the premises.

BOYD & TAYLOR,

/s/ By M. K. TAYLOR,
Attorneys for Plaintiffs,

Duly Verified.

[Endorsed]: Filed March 20, 1956.

[Title of District Court and Cause.]

AMENDMENT TO PARAGRAPH VII OF THE COMPLAINT

Come now the plaintiffs and file herein its amendment. Said amendment consists in changing Paragraph VII as follows:

VII.

That there is an actual controversy between the plaintiffs and said defendant under the insurance policy contract, hereinbefore set forth, entitling plaintiffs, by virtue of the existence of such actual controversy to have declared the present existing rights, and other legal relations between the parties herein under said insurance contract; that said controversy more particularly is that under said insurance contract the defendant has and does contend that the occurrence which was the subject matter of the action against him for damages to the rice crop (and heretofore more particularly set forth and described) and the judgment obtained in said action, was and is an occurrence covered by said contract of insurance. That these plaintiffs contend and do now assert that the occurrences and activities arising out of the operation of a duck club for commercial gain (all as hereinbefore alleged) was a business or commercial operation not covered

but excluded from coverage under said insurance contract or policy.

BOYD & TAYLOR,
Attorneys for the plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 24, 1956.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT IVEY

Defendant Everett D. Ivey answers the complaint (as amended) on file herein as follows:

First Defense

The complaint (as amended) fails to state a claim against defendant Ivey upon which relief can be granted.

Second Defense

Defendant Ivey admits the allegations contained in paragraphs I, II, III, IV and VII of the complaint (as amended); denies that Exhibit "A" attached to the complaint is a true copy, but admits that it is a substantially correct copy of the insurance policy and the endorsements, and admits all other allegations contained in paragraph V; admits the allegations contained in paragraph VI that defendant Ivey is a physician and surgeon, that during the month of October, 1953, for the purpose of

creating or maintaining a duck pond or lake on real property solely owned by him at Willows, California, he permitted certain water to be conveyed through a certain ditch, that one Alpheus Brian did file and bring an action for damages against defendant Ivey claiming certain damages to a crop of rice as a result of flooding lands owned, leased or controlled by said Brian, and that said action was filed in the Superior Court of the State of California, County of Colusa, No. 10542, and damages to real property were prayed for in the sum of $33,000, and upon the trial of said action a judgment was obtained by said Alpheus Brian against defendant Ivey, but denies all other allegations of paragraph VI.

Third Defense

Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage.

Counterclaim

By way of counterclaim against plaintiffs and each of them defendant alleges:

Under the terms of the contract of insurance between the parties plaintiffs and each of them promised and agreed to defend defendant Ivey against the suit by Alpheus Brian alleged in the complaint and to pay the costs and expenses thereof. Plain-

tiffs and each of them failed, neglected, and refused to defend said suit against defendant or to pay costs and expenses thereof for a period of time during which defendant was compelled to employ and did employ attorneys to defend said suit and pay the reasonable value of the services of such attorneys together with court costs in the total sum of $860.00, which sum is due, owing, and unpaid from plaintiffs to defendant.

Wherefore, defendant Ivey prays that the court may declare the rights and other legal relations of the parties and determine that by reason of said contract of insurance plaintiffs are and each of them is obligated to pay any final judgment obtained by said Brian against defendant Ivey; that defendants have judgment against plaintiffs and each of them on the counterclaim in the sum of $860.00; that defendant have such other and further relief as may be proper and necessary.

ALEXANDER, BACON AND
MUNDHENK,

/s/ W. C. BACON,
Attorneys for Defendant Ivey.

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause.]

ORDER FOR ENTRY OF JUDGMENT

This cause having come on for hearing before the above entitled court and the court having heard oral argument of counsel, having considered the pleadings in this action and the written briefs filed by counsel for the parties, It Is By The Court Ordered:

That there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the plaintiffs as prayed. Plaintiffs to prepare findings of fact and conclusions of law pursuant to Rule 21 of this Court.

Dated: January 30, 1957.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed Jan. 30, 1957.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It Is Hereby Stipulated between the parties through their respective counsel that the plaintiffs may have to and including February 11, 1957,

within which to file findings of fact and conclusions of law in the above captioned case.

BOYD & TAYLOR,
Attorneys for Plaintiffs.

ALEXANDER, BACON AND MUNDHENK,
Attorneys for Defendant.

So Ordered:

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed Feb. 6, 1957.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for trial on the 29th day of November, 1956, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury, M. K. Taylor, Esq., of Boyd & Taylor appearing as attorney for plaintiffs, United National Indemnity Company, a corporation; National Fire Insurance Company of Hartford Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and W. C. Bacon, Esq., of Alexander, Bacon & Mundhenk appearing as attorney for defendant, Everett D. Ivey; and the Court having heard the testimony and having examined the

proofs offered by the respective parties, and the cause having been submitted to the Court for decision and the Court being fully advised in the premises now makes its Findings of Fact as follows:

Findings of Fact

1. That on or about January 15, 1953, United National Indemnity Company issued to defendant, Everett D. Ivey, its Comprehensive General Automobile Liability Policy #10122; that under "Coverage C — Property Damage Liability — Except Automobile" there was no premium charged and no property damage liability afforded defendant, Everett D. Ivey;

2. That there was attached to said policy and forming a part of said policy an Endorsement entitled "Individual As Named Insured;" that said endorsement became effective on January 15, 1953;

3. That said "Individual As Named Insured" endorsement contained the following language:

"It is agreed that:

I. The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business at which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits.

'Business' includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part

to others, or held for such rental, by the insured other than (a) the insured's residence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) garages and stables incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows."

4. The defendant, Everett D. Ivey, for many years prior to the issuance of the aforesaid policy had practiced medicine having an office at 230 Grand Avenue, Oakland, California.

5. That defendant, Everett D. Ivey, between the years 1947 and January 15, 1953, had purchased parcels of land in Colusa County where he operated a Duck Club as a business enterprise.

6. That defendant, Everett D. Ivey, was the sole owner of this Duck Club business which he conducted.

7. That an estimated premium of $40.00 was charged for insurance coverage on the Duck Club business property in Colusa County, California.

8. That an estimated premium of $8.00 was charged for insurance coverage on the medical office at 230 Grand Avenue, Oakland, California.

9. That both of said premium charges were shown on the Extension Schedule, (Plaintiff's No. 2 in Evidence,) under the column headed B.I. which

stands for Bodily Injury; that no figures appear for either of these properties under the column headed P.D. which stands for Property Damage.

10. That said Extension Schedule, (Plaintiff's No. 2 in Evidence,) is not a part of the policy but was supplied to the agent, Mr. Duncan H. Knudsen.

11. That the words "Flat Charge" appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury Premium.

12. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for either or both of his business properties.

13. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either or both of his business properties.

14. That Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Indi-

vidual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

16. That the action filed in the Superior Court of the State of California, County of Colusa #10542 entitled "Alpheus Brian v. Everett D. Ivey, et al." is for property damage to the crop of rice of Alpheus Brian claimed to have arisen from the maintenance of a duck pond or lake on the property of Everett D. Ivey.

Conclusions of Law

From the foregoing Facts the Court concludes as follows:

1. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties.

2. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties.

3. That the Named Insured Endorsement of policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner.

4. That plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance.

5. That plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint.

6. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Individual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

7. That the said insurance policy and endorsement speak for themselves.

8. That plaintiffs have a right to seek declaratory relief against the defendant, Everett D. Ivey.

9. That plaintiffs are entitled to a judgment declaring that the policy and endorsements do not provide for property damages insurance coverage to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

10. That judgment be entered in favor of plaintiffs and against defendant in said action with costs.

Let Judgment be entered accordingly.

Dated: February ....., 1957.

.....

Chief Judge U. S. District Court.

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Lodged Feb. 11, 1957.

[Title of District Court and Cause.]

DEFENDANT IVEY'S PROPOSED MODIFICATIONS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Ivey proposes the following modifications of the findings of fact and conclusions of law prepared and lodged by plaintiff:

1. Strike out the word "no" twice appearing in Finding of Fact No. 1 (line 6, page 2), for the reason that it is contrary to and not supported by the evidence.

2. Strike out Finding of Fact No. 7 (lines 2-4, page 3), for the reason that it is contrary to and not supported by the evidence, and in lieu thereof insert the following which the evidence established: That a negotiated, arbitrary, and flat charge of $40.00 was made by the insurer for bodily injury coverage and property damage coverage on the operation classified as Duck Club.

3. Strike out Finding of Fact No. 8 (lines 5-7, page 3), for the reason that it is contrary to and not supported by the evidence, and in lieu thereof insert the following which the evidence established: That a minimum premium of $8.00 was charged for bodily injury coverage for the operation classified as 230 Grand Avenue, but subject to the "Malpractice Exclusion Endorsement" attached to the said policy.

4. Strike out Finding of Fact No. 9 (lines 8-12), page 3, for the reason that it is immaterial.

5. Add the words "on the insurer" before the comma in Finding of Fact No. 10 (line 15, page 3), and the words "who sold the insurance to defendant Ivey" before the period in said line 15, page 3, for the reason that the evidence established said facts and each of them.

6. Strike out the word "only" in Finding of Fact No. 11 (line 18, page 3), for the reason that it is contrary to and not supported by the evidence, and before the period in said line 18, page 3, add the words "and Property Damage Premium", for the reason that the evidence established such fact.

7. Strike out the words "for either or both of his business properties", in Finding of Fact No. 12 (lines 20-21), page 3, for the reason that such finding it contrary to and not supported by the evidence, and in lieu thereof insert "for the operation classified as 230 Grand Avenue", for the reason that the evidence established such fact.

8. Strike out Finding of Fact No. 13 (lines 22-24, page 3), for the reason that it is contrary to and not supported by the evidence, and in lieu thereof insert the following which the evidence established: That plaintiff, United National Indemnity Company, provided property damage insurance coverage for the operation classified as "Duck Club rated as: Clubs N.O.C."

9. Strike out, as contrary to and not supported

by the evidence, the word "not" in Finding of Fact No. 14 (line 27, page 3), and words "for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey".

10. Strike out the word "no" appearing three times in Finding of Fact No. 15 (line 32, page 3, to line 3, page 4), for the reason that it is contrary to and not supported by the evidence.

11. Strike out the word "not" in Conclusion of Law No. 1 (line 12, page 4), for the reason that it is contrary to the law and the facts.

12. Strike out the word "not" in Conclusion of Law No. 2 (line 15, page 4), for the reason that it is contrary to the law and the facts.

13. Insert the word "includes" for the word "excludes" in Conclusion of Law No. 3 (line 18, page 4), for the reason that it accords with the law and the facts.

14. Strike out the word "not" twice appearing in Conclusion of Law No. 4 (lines 20-22), page 4, for the reason that it is contrary to the law and the facts.

15. Strike out the word "no" appearing in Conclusion of Law No. 5 (line 24, page 4), and the word "not" (Line 25, page 4), for the reason that each is contrary to the law and the facts.

16. Strike out Conclusion of Law No. 7 (lines 30-31), page 4, for the reason that it is contrary to the law and the facts.

17. Strike out Conclusion of Law No. 9 (lines 2-6), page 5, for the reason that it is contrary to the law and the facts.

18. Strike out Conclusion of Law No. 10 (lines 7-8), page 5, for the reason that it is contrary to the law and the facts.

Wherefore, said defendant prays that findings of fact and conclusions of law prepared and lodged by plaintiffs be modified in the foregoing and each of the foregoing respects.

Dated: February 15, 1957.

/s/ W. C. BACON,
ALEXANDER, BACON AND MUNDHENK,
Attorneys for said Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 15, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for trial on the 29th day of November, 1956, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury, M. K. Taylor, Esq., of Boyd & Taylor appearing as attorney for plaintiffs, United National Indemnity Company, a corporation; National Fire Insurance

Company of Hartford, Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and W. C. Bacon, Esq., of Alexander, Bacon & Mundhenk appearing as attorney for defendant, Everett D. Ivey; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision and the Court being fully advised in the premises now makes its Finding of Fact as follows:

Findings of Fact

1. That on or about January 15, 1953, United National Indemnity Company issued to defendant, Everett D. Ivey (its Comprehensive General Automobile Liability Policy #10122; that under "Coverage C—Property Damage Liability—Except Automobile" there was no premium charged and no property liability afforded defendant, Everett D. Ivey, insofar as the Duck Club and the office premises are concerned.

2. That there was attached to the said policy and forming a part of said policy an Endorsement entitled "Individual As Named Insured;" that said endorsement become effective on January 15, 1953;

3. That said "Individual As Named Insured" endorsement contained the following language:

"It is agreed that:

I. The policy does not apply to any business pursuits of an insured, except (a) in connection with

the conduct of a business at which named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits.

'Business' includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental, by the insured other than (a) the insured's residence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) garages and stables incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows."

4. The defendant, Everett D. Ivey, for many years prior to the issuance of the aforesaid policy had practiced medicine having an office at 230 Grand Avenue, Oakland, California.

5. That defendant, Everett D. Ivey, between the years 1947 and January 15, 1953, had purchased parcels of land in Colusa County where he operated a Duck Club as a business enterprise.

6. That defendant, Everett D. Ivey, was the sole owner of this Duck Club business which he conducted.

7. That a premium of $40.00 was charged for insurance coverage on the Duck Club business property in Colusa County, California.

8. That a premium of $8.00 was charged for insurance coverage on the medical office at 230 Grand Avenue, Oakland, California.

9. That both of said premium charges were shown on the Extension Schedule, (Plaintiff's No. 2 in Evidence,) under the column headed B.I. which stands for Bodily Injury; that no figures appear for either of these properties under the column headed P.D. which stands for Property Damage.

10. That said Extension Schedule, (Plaintiff's No. 2 in Evidence.) is not a part of the policy but was supplied to the agent of the insurer, Mr. Duncan H. Knudsen, who sold the insurance to the defendant, Everett D. Ivey.

11. That the words "Flat Charge" appearing on the Extension Schedule opposite Duck Club applies to the amonut of premium charged with respect only to the Bodily Injury premium.

12. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.

13. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property.

14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from

the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Individual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

16. That the action filed in the Superior Court of the State of California, County of Colusa #10542 entitled "Alpheus Brian v. Everett D. Ivey, et al." is for property damage to the crop of rice of Alpheus Brian claimed to have arisen from the maintenance of a duck pond or lake on the property of Everett D. Ivey.

Conclusions of Law

From the foregoing Facts the Court concludes as follows:

1. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties.

2. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties.

3. That the Named Insured Endorsement of

Policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner.

4. That plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mention is not an occurrence covered by said policy of insurance.

5. That plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint.

6. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Individual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

7. That the said insurance policy and endorsement speak for themselves.

8. That plaintiffs have a right to seek declaratory relief against the defendant, Everett D. Ivey.

9. That plaintiffs are entitled to a judgment declaring that the policy and endorsements do not provide for property damage insurance coverage to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

10. That judgment be entered in favor of plaintiffs and against defendant in said action with costs.

Let Judgment be entered accordingly.

Dated: March 12, 1957.

/s/ MICHAEL J. ROCHE,
Chief Judge of U. S. District Court.

Approved as to form only.

ALEXANDER, BACON AND MUNDHENK,
Attorneys for Defendant.

[Endorsed]: Filed March 12, 1957.

In the United States District Court, Northern District of California, Southern Division

No. 35333

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Plaintiffs,

vs.

EVERETT D. IVEY, et al., Defendants.

JUDGMENT

The above entitled action having come on for trial on the 29th day of November, 1956, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury, M.

K. Taylor, Esq., of Boyd & Taylor, appearing as attorneys for plaintiffs, United National Indemnity Company, a corporation; National Fire Insurance Company of Hartford Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and W. C. Bacon, Esq., of Alexander, Bacon & Mundhenk appearing as attorney for defendant, Everette D. Ivey; and the Court having signed and filed herein its Order for Entry of Judgment and having signed and filed its Findings of Fact and Conclusions of Law.

Now, Therefore, It Is Ordered, Adjudged and Decreed that United National Indemnity Company Comprehensive General Automobile Liability Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

It Is Further Ordered, Adjudged and Decreed that judgment is rendered in favor of plaintiffs, United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and against defendant, Everett D. Ivey, on the cross-complaint.

It Is Further Ordered, Adjudged and Decreed that the plaintiffs, United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford Connecticut, a corporation, and

Transcontinental Insurance Company, a corporation, recover their costs herein, taxed at $79.80.

Done in open Court this 12th day of March, 1957.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

Approved as to form only.
ALEXANDER, BACON AND MUNDHENK,
Attorneys for Defendant.

Entered in civil docket, 3/12/57.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 12, 1957.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Messrs.: Boyd & Taylor, Attys., 350 Sansome St., San Francisco 4, Calif. Messrs.: Bacon & Mundhenk, 315 Montgomery St., San Francisco, Calif.

You Are Hereby Notified that on March 12th, 1957 a Decree Judgment was entered of record in this office in the above entitled case.

San Francisco, California, March 12th, 1957.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR NEW TRIAL

Defendant moves that the judgment entered herein be vacated and set aside and that a new trial be granted upon the following and each of the following grounds:

1. Findings 11, 12, 13, 14 and 15 are and each of them is against the evidence.

2. Findings 11, 12, 13, 14 and 15 are and each of them is not supported by the evidence.

3. The court erred in finding that the policy was not ambiguous, and in failing to find that the policy was ambiguous.

4. The court erred in finding that there was no premium charged and no property damage liability afforded defendant insofar as the Duck Club is concerned.

5. The court erred in entering judgment for plaintiff.

6. The judgment is contrary to the evidence.

7. The judgment is against the weight of the evidence.

8. The judgment is not supported by substantial evidence.

Dated: March 22, 1957.

ALEXANDER, BACON & MUNDHENK

/s/ W. C. BACON,

/s/ HERBERT CHAMBERLIN,

Attorneys for Defendant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 22, 1957.

[Title of District Court and Cause.]

NOTICE OF HEARING OF DEFENDANT'S MOTION FOR NEW TRIAL

To Plaintiffs and to Boyd & Taylor and M. K. Taylor, Their Attorneys:

Please Take Notice that defendant's motion for a new trial heretofore served and filed in the above cause will be heard on Wednesday, April 3, 1957, at 10:00 o'clock A.M. in the Department of the Honorable Michael J. Roche, Chief Judge of the above-entitled Court, located in the United States Courthouse and Post Office Building, San Francisco, California.

Dated: March 26, 1957.

AEXANDER, BACON & MUNDHENK,

/s/ W. C. BACON,

Attorneys for Defendant.

Certificate of Mailing Attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION TO STRIKE TESTIMONY FROM THE RECORDS

Comes now plaintiff, United National Indemnity Company, in the above entitled matter and moves the Court for its Order striking out the following testimony from the record, that testimony being

admitted into evidence subject to a Motion to Strike.

"Mr. Bacon: Q. Mr. Knudsen, when you took the matter up with the Oakland branch office of the United National Indemnity Company to obtain that initial policy, did you discuss with the company representative there the coverages that you desired for Dr. Ivey?

A. Yes, I did. We requested the combination personal liability on the various properties I have described a few minutes ago.

Q. And was the subject of rates discussed at that time?

A. Yes, this subject did come up because of the fact that two of these parcels that I have mentioned did not have buildings on them and were vacant land. The question was asked whether—what they were used for, and the reply was that they were used for duck shooting during the duck season. The underwriter expressed some desire for a premium because vacant land is ordinarily rated without a premium charge. There was then negotiated a flat charge to embrace these two parcels plus the parcel that had the six buildings located thereon, which is away from the other two.

Q. And when you mention a negotiated rate for those properties, who do you mean by that?

A. Well, I mean as opposed to a calculated rate, which would be a rate appearing in a manual providing a rate per location or per acre or per hundred dollars of receipts or whatever the measure might be. That is what we call a calculated rate. A negotiated rate would be an agreed premium ne-

gotiated betwen the agent and the company as to a particular exposure.

Q. In the negotiation for and fixing of that rate was the subject of coverage discussed; that is, whether it included property damage or not?

A. It was assigned and rated under the comprehensive personal coverage which is a single limit insurance; in other words, including property damage and bodily injury liability.

Q. And what premium do you recall was——

A. It was in the neighborhood of $30; I don't recall exactly.

Q. And that was in the policy we have been discussing in 1951? (Page 82, Line 11-Page 83, Line 24.)

A. '51; correct."

Plaintiff moves that the above testimony be stricken on the grounds that the written contract of insurance between plaintiff and defendant speaks for itself, it is the culmination of preliminary negotiations, is not ambiguous and to permit evidence of preliminary negotiations would be a violation of the Parole Evidence Rule.

"Q. I show you Plaintiff's Exhibit No. 2, which is identified as an extension schedule, and I will ask you to look at that and tell me what that calculation on there with respect to charges and premiums means—the notations on there, what they mean.

A. Well, there are——

Mr. Taylor: Excuse me, Mr. Knudsen. Your Honor, I understand that our objection will go to this, too, because of the fact that it speaks for itself.

Mr. Bacon: This is the company's agent, your Honor, and he has negotiated this insurance, so we will know and can only know from his mouth from what they were doing in fixing these rates, and what they were providing.

The Court: I will allow it as I did the others subject to a motion to strike and over your objection. I call your attention to the fact that I think your legal objection is good. However, I am giving you a record on it.

The Witness: Proceed?

Mr. Bacon: Yes.

A. There are again a dwelling at 46 Hardwick Ave. rated at a flat charge on the comprehensive personal basis including public liability and property damage. This is true also of the property at Hamburg; one at 40 Hardwick Ave.; the farm premises at Alamo, and the acreage at the Willows locations. Again this was negotiated on a flat charge basis that the other four properties are and at a charge of $40. There is a fifth location which is written on a liability only basis at 230 Grand Avenue, indicating a liability rate of .896 times an area of 125 square feet, extended to a minimum liability of $8." (Page 87, Line 9—Page 88, Line 13.)

Plaintiff moves to strike the above answer on the same grounds heretofore given that the insurance policy being a written contract speaks for itself.

"Q. When you find a reference in this column headed "Rates" to a flat charge under both columns

B.I. and D.P., what does that mean, Mr. Knudsen?

A. That contemplates a flat charge premium embracing public liability and property damage which I had signed originally as comprehensive personal liability insurance." (Page 90, Line 11-Line 16.)

Plaintiff moves to strike the above testimony on the same grounds as heretofore given, that the written contract speaks for itself.

"Q. Now I will ask you this question, then, Mr. Knudsen; on this record of this policy, this extension schedule, did Dr. Ivey pay a premium for property damage coverage as well as bodily injury coverage under the individual endorsement on the properties in Colusa County?

Mr. Taylor: To which we object, your Honor; that is exactly the question to be decided by your Honor. That would be the opinion and conclusion of this witness.

Mr. Bacon: I again remind the Court this this is the company's agent, not a broker. This is the company's agent and he is in a position to say what premiums were negotiated with respect to this policy and what coverage was sought and obtained; and I think when we ask him if Dr. Ivey paid a premium for that coverage, we are entitled to the answer from the company's mouthpiece.

Mr. Taylor: Your Honor, the schedules and the exhibits are in writing, and they speak for themselves.

Mr. Bacon: No, they do not; that is the point.

The Court: In the interests of time I will allow

it in subject to the same motion so that you have not lost any of your legal rights if your position is correct. All right.

Mr. Bacon: Will you please answer the question: Shall I reframe it or will you read it to him?

(Question read by the reporter.)

A. Yes, that was the premium to which I referred earlier in testimony as being negotiated.

Q. And did you tell that to Dr. Ivey?

A. Yes, sir." (Page 95, Line 10-Page 96, Line 12.)

Plaintiff moves to strike the above testimony on the grounds that the written contract of insurance speaks for itself and to permit testimony of prior negotiations violates the Parole Evidence Rule.

"Mr. Bacon: Q. Mr. Knudsen, after you discussion with Dr. Ivey and obtaining all the information about his properties as you have told us, what insurance coverage did you provide him? What did he get under this policy we are concerned here with?

Mr. Taylor: Your Honor, the policy speaks for itself as to what he got. We will object to any attempt to enlarge upon it, as to what he got.

Mr. Bacon: This man is an agent of the company and he knew what was sought and he knew what was given. Now, if by any chance it can be said that this policy doesn't cover it, we are certainly entitled to have the benefit of what was sought and what was given.

The Court: You are limited to the policy itself.

Mr. Bacon: I don't understand that to be the law, your Honor.

The Court: Well, if it isn't the law, you persuade me otherwise. I will give you full opportunity.

Mr. Bacon: We will have some authorities on that, your Honor.

The Court: I will allow it subject to a motion to strike your objections.

Mr. Bacon: Do you understand the question?

The Witness: The question again, please Mr. Bacon.

Q. I asked you if after you had obtained all the information from Dr. Ivey about his properties and his requests for insurance, did you provide him with the coverage he asked?

A. Yes, which was public liability and property damage with the exception of this office location which I mentioned previously.

Q. That was what the doctor wanted and that was what you gave him.

A. That is correct." (Page 124, Line 8-Page 125, Line 15.)

Plaintiff moves to strike the above testimony on the grounds heretofore given that the written policy of insurance speaks for itself.

"The Court: What insurance did they want? What was said?

A. Well, at the time I insured the doctor, I urged him to—I knew that he had a number of small enterprises, and I urged him to take out a general liability policy to cover all of his activi-

ties with the exception of malpractice. He did that, and he paid a large premium for it. Then at the time I retired I explained the very same situation to Mr. Knudsen, and he said that he would carry on and see that the doctor was fully covered, because I told him that the doctor expected that coverage." (Page 129, Line 25-Page 130, Line 9.)

Plaintiff moves to strike the above testimony, this being the answer of Mrs. Marshall, a prior insurance broker for defendant concerning conversations between the witness and defendant out of the presence of plaintiff. Said testimony is hearsay and self-serving insofar as defendant is concerned.

Respectfully submitted,

BOYD & TAYLOR,
/s/ By M. K. TAYLOR,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 16th day of April, in the year of our Lord one thousand nine hundred and fifty-seven.

Present: the Honorable Michael J. Roche.

This case came on for hearing this date on motion of the defendant for new trial and motion of the plaintiff to strike from testimony.

Ordered motion for new trial denied and motion of plaintiff to strike from testimony granted.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Everett D. Ivey, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 12, 1957.

ALEXANDER, BACON &
MUNDHENK,
/s/ W. C. BACON,
Attorneys for Appellant.

Affidavit of Mailing Attached.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Everett D. Ivey, defendant herein, has prosecuted, or is about to prosecute, an appeal to the United States Court of Appeals for the Ninth Circuit from a judgment entered in the above-entitled action on March 12, 1957, by the District Court of the United States for the Northern District of California, Southern Division;

Now therefore, in consideration of the premises, the undersigned Columbia Casualty Company, a corporation duly organized and existing under the laws of the State of New York, and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of said Everett D. Ivey, Appellant, to pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of two hundred fifty dollars ($250.00), to which amount said Columbia Casualty Company acknowledges itself justly bound.

And it is agreed that in case of a breach of any condition of the within obligation, the Court in the above-entitled matter may, upon notice to the undersigned surety of not less than ten days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, sealed and dated this 13th day of May, 1957.

[Seal] COLUMBIA CASUALTY COMPANY,
/s/ By E. R. MacDOUGALL,
Its Attorney-in-Fact.

Certificate of Notary Attached.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant, except the Reporter's transcript of proceedings on motion for new trial and motion to strike is not included for the reason said transcript has not been filed by the Reporter:

Excerpt from Docket Entries.

Complaint.

Amendment to Paragraph VII of the Complaint.

Answer of Defendant Ivey.

Order for Entry of Judgment.

Stipulation and Order Extending Time to File Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law as Lodged.

Proposed Modifications of Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Judgment.

Notice by Clerk of Entry of Judgment.

Motion for New Trial.

Notice of Hearing Motion for New Trial.

Motion of Plaintiff to Strike from Testimony.

Minute Order Granting Motion to Strike and Denying Motion for New Trial.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Reporter's Transcript of Proceedings, November 29, 1956, and December 3, 1956.

Plaintiffs' Exhibits 1, 2, 3 and 4.

Defendant's Exhibits A, B and C. (Note: Defendant's Exhibit D is included herein and designated as Plaintiffs' Exhibit 4.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 20th day of June, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

The United States District Court, Northern District of California, Southern Division

No. 35,333

UNITED NATIONAL INDEMNITY COMPANY, a corporation, Plaintiff,

vs.

EVERETT D. IVEY, Defendant.

TRANSCRIPT PROCEEDINGS OF TRIAL

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Messrs. Boyd & Taylor by M. K. Taylor, Esquire. For the Defend-

ant: Messrs. Alexander, Bacon & Mundhenk by W. C. Bacon, Esquire, and Herbert Chamberlain, Esquire. [1]*

November 29, 1956

The Clerk: Calling United National Indemnity Company, versus Everett D. Ivey.

Mr. Taylor: Ready for plaintiff.

Mr. Bacon: Ready.

The Clerk: Will counsel state your appearances for the record, please.

Mr. Taylor: M. K. Taylor, of the firm of Boyd & Taylor appearing for the plaintiff, United National Indemnity Company.

Mr. Bacon: W. C. Bacon, of the firm of Alexander, Bacon & Mundhenk, and Herbert Chamberlin appearing for the defendant Ivey.

The Court: Proceed.

Mr. Taylor: Your Honor, may be have an Order excluding witnesses?

The Court: You may call them off. All the witnesses in this case who have been subpoenaed will retire from the courtroom until called.

Mr. Taylor: Your Honor, may Mr. Havner, as the Chief Underwriter of United National as the plaintiff's representative, remain?

The Court: Very well.

Mr. Taylor: A short opening statement, your Honor to acquaint your Honor with the problem which is at hand.

This is a suit for declaratory judgment under the

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

provisions of Title 28 of the U. S. Code, paragraph 2201, in [3] which the United National Indemnity Company seeks a determination of their rights and of the rights of the defendant, Dr. Everett Ivey.

It is admitted that the plaintiff issued a policy of insurance on a comprehensive liability form to the defendant for the period of one year from January 15, 1953 to January 15, 1954, and the defendant paid certain premiums for that policy. A copy of the policy and the endorsements is attached to the complaint.

The evidence will show that the claim which was made against Dr. Ivey was one for property damage and property damage only.

The evidence will show that what we call the basic policy provided for bodily injury liability and automobile property damage, and it did not provide for any other property damage coverage. That is the basic policy.

I might say that the property damage claim which was made against Dr. Ivey does not arise out of the use of an automobile so that the basic policy, repeating, was for bodily injuries only and automobile property damage.

The evidence will show that at the same time the policy was issued, an endorsement known as "Individual as Named Insured" endorsement was issued and attached to the basic policy, which provided additional coverage as shown by the endorsement. This endorsement provided for both personal [4] injury and property damage coverage. That supplements the basic policy.

The evidence will show that the, we will call it, individual liability, the "Individual as Named Insured" endorsement as it is a little long title, but that is the caption of it—and will show that the basic policy applies to the business pursuits of the individual being insured and, repeating, that the basic policy does not have a property damage coverage that is being sought by the defendant.

The Individual as Named Insured endorsement states that, except as it applies to the conduct of the business in which Dr. Ivey is the sole owner, the policy is amended. So we take the position that the endorsement does not apply to the business activities of the doctor, but the endorsement does apply to the personal activities of the doctor. And I might say that the endorsement covers both bodily injury and property damage, but it applies, as we contend, to the personal activities of the doctor. Then it is our position that the policy is the policy that applies only to the doctor's business activities.

I think those are the full basic issues. Counsel may disagree with what I have said, but I think that is basically substantially what the evidence will show.

The evidence will further show that Dr. Ivey began to purchase property in Colusa County some time in 1946 or 1947 [5] which he used for duck hunting, and as time went along he added parcels until he acquired somewhat ever 400 acres of property in Colusa County which was used for duck hunting and duck hunting activities.

He bought five Government portable houses and

hauled them up to Colusa County and installed them up there for the benefit of shooters. He installed duck blinds and barrels and double barrels. I am not much of a duck hunter, but I think it will come out from the evidence what these things are that he installed.

I think the evidence will show that he improved the properties which were originally duck lakes by putting up levies and cross-levies and improving it for the purposes of shooting, and he put up certain irrigation gates and means for controlling the water that came from the irrigation district.

The evidence will show that he had a Jeep and he had a Chevrolet truck and that he had other equipment, I think in the nature of bulldozers and things like that, which he had up at the place which he called, himself, or he gave it a name as he called it the Willow Creek Duck Club or Willow Creek Gun Club, and in 1949 he put in a cabin. The costs of all of these items will be brought up by the evidence.

About 1947 he began charging persons for the privilege of coming up and hunting ducks. At first it was $150.00 a [6] season, and later I believe the evidence will show that it was increased to $200.00 per person per season and on one piece of property which he acquired in, I believe, 1952, he began to charge $300.00 per person per season for the privilege of coming up and shooting at the duck club or on the premises. And by 1953 his gross income was a little over $6,100.00 from memberships or whatever he calls them—people coming up and shooting. I think

there was some other slight amount of gross income from pasturage and things like that, but the great bulk of it, I don't think there is any doubt, came from the shooters, people who were participating in the hunting.

The evidence will further show that some time in the fall of 1953 a neighbor's rice crop was flooded. Claim was made that the flooding was caused by water coming from ditches serving Dr. Ivey's property. Suit was filed against Dr. Ivey in Colusa County praying for damages to the real property of this plaintiff in Colusa County. The suit was tried and judgment was obtained against Dr. Ivey.

As we stated in our complaint, it is our contention that the evidence will show that the defendant, Dr. Ivey, was engaged in a business pursuit in this duck club activity or this hunting activity in this operation in Colusa County, and that his business activities—he was a full-time physician in addition —that his business activities as a physician and his business activities in connection with the hunting and the [7] shooting, we contend, under the basic policy for which no property damage is provided; we do not come under the personal Individual as Named Insured endorsement for which property damage is provided.

Thank you, your Honor.

Mr. Chamberlin: May it please the Court, the defendant's evidence will show that when he made application to the insurance company for insurance, he made a full disclosure and application of

all the insurance coverage he wanted. Included in that application was the so-called duck club. The insurance company accepted a premium from him for insuring his activities in connection with the duck club.

When a loss under the policy occurred, the insurance company welched on its contract, your Honor.

We will show, as I say, that he bought and paid for the very insurance which the insurance company refused to give him.

I think that is the position of the defendant in this case, your Honor.

The Court: For the purpose of the record, in the interests of time, can you make any stipulations in relation to this evidence?

Mr. Bacon: We can stipulate, I believe, your Honor, that the insurance was first taken out in 1951 and that the present policy is a renewal from year to year of that original policy. [8]

The Court: So stipulated?

Mr. Taylor: Your Honor, we will stipulate that this is a renewal; but the company has not been able to place their hands on the 1951 policy, so we cannot tell whether it was on the same policy form or whether the same endorsements appear.

The Court: Have you got that 1951 policy?

Mr. Taylor: If the doctor has his copy of the 1951 policy, we would like to see it, and if the '52 —what we should say, the one which began in 1953 is the one that is affected——

The Court: We are now talking about the 1951; aren't we?

Mr. Taylor: Counsel mentioned '51, but I am not aware of the fact that it began that early, and we have searched our files——

The Court: Is the '51 policy here?

Mr. Chamberlin: We have the insurance agency who wrote that policy, your Honor.

Mr. Bacon: He isn't in the courtroom.

Mr. Chamberlin: Do you have any of your older policies?

Dr. Ivey (the Defendant): I presume I do. I am not sure. I think I will have them.

Mr. Chamberlin: Do you have daily reports back to '51?

Mr. Taylor: We do not, counsel. [9]

Mr. Chamberlin: We can supply them if you don't have them.

Mr. Taylor: '53.

Mr. Chamberlin: Is that all you have?

Mr. Taylor: That is all we have.

Mr. Chamberlin: We will have to supply that, your Honor, because we have the insurance agent who made the application. He has copies.

The Court: Very well.

What other matters can we take up now in the interests of time?

Mr. Taylor: Under the pleadings, your Honor, there is an admission that the copy which was put in as Exhibit A was substantially true, and I don't know in what regard they say it wasn't true.

Mr. Chamberlin: It was just a blank form, your

Honor. On the face of it it didn't show any details. We have the original policy.

Mr. Bacon: We have the original policy for '53. That is the one involved, and the exhibit is substantially correct. There are a few things that are not.

Mr. Taylor: I think that the original can be offered in evidence.

The Court: Very well.

Mr. Taylor: We can agree on that. [10]

The Court: Are there any other matters that you can stipulate to in the interests of time?

Mr. Taylor: We have the matter of the income tax returns for the years which are involved that counsel has been kind enough to let me see. I have not had a chance to more than make a few notes. The income tax returns I think would be essential and I think that we can agree that they are the copies of the income tax returns.

Mr. Bacon: There is no question, I have them here, your Honor. They can go into evidence if it is necessary, but it seems to me we might simplify the record by conceding that there was income and no profit until the last year.

The Court: I won't develop anything as far as they refer to anything that is not in suit.

Mr. Bacon: There is no dispute over the returns. I have copies of them.

The Court: Very well. Call your first witness.

Mr. Taylor: We will call Mr. Ben Havner, if the Court please.

BEN HAVNER

called as a witness on behalf of the plaintiff; sworn.

The Court: Your full name, please?

A. Ben Havner.

Q. (By the Court): And where do you live? [11]

A. Los Altos.

Q. Your business or occupation?

A. Insurance.

Q. What company?

A. At the present the National Fire Insurance Company.

Q. How long have you been so engaged?

A. Since 1942.

Q. Was that your first venture in the insurance business?

A. No; it is with the National Fire Insurance Company.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Taylor): Mr. Havner, is the United National Indemnity Company of New York a member of the National Fire Insurance Company group?

A. It was at the time the policy was written; it has now been dissolved and absorbed by the National Fire Insurance Company.

Q. As of the time this policy was written, by whom were you employed?

A. I was employed by the National Hartford group which includes the United National Indemnity Company.

Q. What was your position there?

(Testimony of Ben Havner.)

A. I was superintendent of underwriting.

Q. What is your present position?

A. The same. [12]

Q. When did you first go into the insurance business? A. In 1931.

Q. And with whom did you start at that time?

A. Swett and Crawford in Los Angeles.

Q. In what capacity?

A. Oh, as a statistician to start with.

Q. When did you start getting more experience in the underwriting of insurance?

A. About 1935.

Q. And with whom?

A. Swett and Crawford.

Q. How long did you remain employed by Swett and Crawford? A. Until 1942.

Q. From '35 to '42 what was your position with Swett and Crawford?

A. As an underwriter of casualty insurance.

Q. In 1942 did you continue in the insurance business? A. Yes, I did.

Q. With whom?

A. I made a mistake; I should have said 1944 I started with National Fire. 1942 I went to work for the Employers Group.

Q. In what capacity?

A. As an underwriter.

Q. And you worked for them until when?

A. October of 1944. [13]

Q. And in October 1944 who did you go with?

A. The National Hartford group.

(Testimony of Ben Havner.)

Q. And you are still with that same group as of the present time? A. Yes.

Mr. Bacon: We will stipulate that may go in as a defendant's exhibit. We do not have it.

Mr. Taylor: I show you a document and ask you what that is, Mr. Havner.

A. It is a comprehensive general liability contract running in favor of Dr. Everett Ivey.

Q. And what are the dates on it?

A. January 1953 to '54.

The Court: Let it be admitted and marked first in order.

The Clerk: Defendant's Exhibit A admitted and filed in evidence.

(Whereupon insurance policy, Jan. 1953-54, referred to above, was received in evidence and marked Defendant's Exhibit A.)

Mr. Taylor: Would your Honor case to see it?

The Court: No.

Q. (By Mr. Taylor): Showing you Defendant's Exhibit A, is there attached to the policy and included within the policy a number of endorsements?

A. Yes, there are. [14]

Q. And were those endorsements issued with the policy? A. Yes.

Q. And were in effect during the life of the policy? A. That's right.

Q. Calling your attention to the face of the policy——

Mr. Taylor: I appreciate it speaks for itself, your Honor, but I would like to have him state for

(Testimony of Ben Havner.)

the record, on the face of the policy what liability coverage is provided for Dr. Ivey.

Mr. Bacon: We object to that, your Honor. The policy speaks for itself and the Court will interpret what coverage is provided.

The Court: The objection will have to be sustained. However, it might assist the Court. Your legal objection is good, but I would like to know about the policy. You may cross examine him.

Mr. Bacon: With that understanding, your Honor, that it is by way of explanation from the point of view of the plaintiff only——

The Court: You will have the same privilege.

Mr. Bacon: Yes, your Honor.

Q. (By Mr. Taylor): Looking at that, what we call the basic policy, what insurance coverage is provided?

Mr. Bacon: I don't like the way the question is asked, your Honor, and I would like to maintain my objection to it. [15] If he wants the witness to help your Honor by saying what is on the face of the document, that is all right; but when he says "what coverage is provided", then we have the question at issue.

The Court: Your objection is good. What is this policy? Tell me about it.

A. It is a comprehensive general liability contract, your Honor.

The Court: Read it—that is, the portion which is in question.

A. Well, the face of the policy under "cover-

(Testimony of Ben Havner.)

ages" provides under coverage A, bodily injury liability, limits of $300,000 for each person and 300,000 each accident. Under coverage B, which is property damage liability—automobile, it provides coverage up to $5,000 for each accident. Under property damage, except automobile, it is plainly marked "Not covered" and there is no premium charge.

The Court: All right.

Q. (By Mr. Taylor): I call your attention to endorsement No. 1 and ask you to explain that in the same fashion that you have explained the face of the policy.

A. Endorsement No. 1 is entitled "Individual as named insured" endorsement. That is the title given to it by what we call the National Bureau, which provides the standard policies and endorsements for all casualty companies. [16] The endorsement provides first that the basic policy shall cover only a business owned by an individual. It second provides that except with respect to business activities the coverage is broadened with respect to the insured's personal activities, that is as possibly his golf activities.

Mr. Bacon: Now, wait; that is going beyond the question, your Honor.

The Court: You are limited to read what the policy says.

A. The policy does declare that—. First it ties down business activities to a business owned by the named insured.

Second, it states that except as it applies to the

(Testimony of Ben Havner.)

conduct of the business of which the named insured is the sole owner, the policy is amended as follows, and from there on it provides what we call personal liability or non-business activity.

Q. (By Mr. Taylor): That personal liability, does it cover property damage as well as personal injury?

A. Yes, there is no division.

Mr. Bacon: May I interrupt a moment?

Mr. Taylor: Excuse me.

Mr. Bacon: Going back to the witness' answer to the previous question, I would like to move to strike it.

Your Honor has asked some help here on the provisions that are involved here in this litigation, and the statement of the witness does not conform to the coverage provided by [17] the endorsement, if I may just read that portion which the witness was referring to.

The Court: Certainly.

Mr. Bacon: The insuring agreement, as the witness pointed out, on the main policy is a general comprehensive automobile liability policy, and then this endorsement to which reference is now being made provides this:

"Insuring agreement 1 is replaced by the following: Liability Coverage.

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting there-

(Testimony of Ben Havner.)

from, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof."

The witness made a statement that it covered the personal liability. I don't know whether that is personal liability, but it is the liability of the insured for those things.

Mr. Taylor: I don't think there is any doubt about it.

The Witness: May I explain something, your Honor?

The Court: No.

The Witness: O.K.

The Court: The witness wants to explain something. Is it agreeable, gentlemen? [18]

Mr. Bacon: I can't invade the recesses of his mind. I don't know what he has in mind.

The Court: I don't either. I can strike it if it isn't pertinent to this case. Is it pertinent?

The Witness: I think it is, your Honor. The paragraph which he has just read is preceded by the sentence which reads:

"Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows:" Then there is a colon after that, and then that paragraph starts in reading:

"Insuring agreement 1 is replaced by the following."

Mr. Bacon: Our position is that Dr. Ivey is the sole owner here.

(Testimony of Ben Havner.)

The Court: You are what?

Mr. Bacon: The position of the defense is that this duck pond, or this property on which the duck pond was put, is the sole property; that the doctor, the defendant, is sole owner of that property.

The Court: There is no doubt about that, is there?

The Witness: No.

Mr. Taylor: No. But may I read this again, your Honor?

The Court: Certainly. [19]

Mr. Taylor: "Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows." Now may I ask this question of the witness:

Q. Does the individual as named insured endorsement cover the business activities of the insured?

Mr. Bacon: Just a minute. I must object to that, your Honor, because it is really calling for the conclusion of this witness.

The Court: Objection sustained. Develop the fact, whatever it is, from the policy itself.

Mr. Taylor: Pardon?

The Court: From the policy itself.

Mr. Taylor: I have read to you the exception. All right. Now, I believe——

The Court: The substance of it is that it is an exception, counsel, as indicated.

Mr. Bacon: Yes.

The Court: All right; let us proceed.

(Testimony of Ben Havner.)

Mr. Taylor: I don't know whether this is in the record or not, but I would like to bring out, does the endorsement, endorsement No. 1 that we have just been discussing, cover both property damage and personal injury liability?

A. Insofar as it applies to non-business activities, yes.

Q. I show you what is entitled a "Survey of Hazards"—— [20]

Mr. Chamberlin: We have to total up a couple of columns of figures.

Mr. Bacon: May I see that just a moment.

Mr. Chamberlin: Is this supposed to be the complete survey or only part of the survey?

Mr. Taylor: There is what is called an extension schedule that I am going to show him in addition to that.

Mr. Chamberlin: This is better, called the Supplement.

Mr. Taylor: Yes, I am going to offer both.

Mr. Bacon: Here is the policy.

Q. (By Mr. Taylor): I show you a document entitled "Survey of Hazards and Application for Comprehensive General-Automobile Liability Policy", and ask you if you can identify that.

A. Yes, I can. This is the company's copy of the policy known as the daily report.

Q. And that is what the company keeps; is that right? A. That is right.

Q. And to it are attached certain slips of paper. Are they kept in the regular course of business?

(Testimony of Ben Havner.)

A. Yes, they are.

Mr. Taylor: We offer those in evidence, your Honor.

The Court: Let them be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence. [21]

(Whereupon "Survey of Hazards" referred to above was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Chamberlin: May I ask you, counsel, if a copy of that goes to the agent?

The Witness: Yes, it does.

Q. (By Mr. Taylor): I show you a document entitled at the top "Extension Schedule". Can you identify that for me, sir?

A. Yes, that is what we call a work sheet. It shows in insurance code language what the—how the premium is—total policy premium is built up. It is for statistical purposes. And it also shows the coverage for which the premium was paid.

Q. And on the back, on the second sheet, what is that?

A. The second sheet is a summary for statistical purposes of the various premium charges by their general classes.

Q. And is this the company's copy of the Extension Schedule which was made up in connection with the policy Defendant's Exhibit A which was issued? A. Yes.

(Testimony of Ben Havner.)

Mr. Taylor: We offer this in evidence, your Honor.

The Court: It will be admitted next in order.

The Clerk: Plaintiff's Exhibit No. 2 admitted and filed in evidence. [22]

Q. (By Mr. Taylor): Mr. Chamberlin asked if these were sent to the agent. Was both a copy of Plaintiff's Exhibit No. 1 and a copy of Plaintiff's Exhibit No. 2 sent to the agent?

A. That is the customary practice. In this particular case, I couldn't swear to it. We always try to.

Mr. Bacon: Does that show who the agent was?

Q. (By Mr. Taylor): Can you tell from either of these who the agent was?

A. Yes, the agent was Duncan H. Knudsen.

The Court: Knudsen?

A. Yes, K-n-u-d-s-e-n.

Mr. Taylor: Your Honor, I appreciate that Plaintiff's Exhibit No. 1 speaks for itself, but I think a simple explanation would be of benefit, and so with that in mind, I would ask you, Mr. Havner, if you could, in addition to what you have said about Plaintiff's Exhibit No. 1, explain it and explain its purpose.

The Court: From the policy itself.

A. Do you want an explanation or just this copy itself?

Mr. Taylor: Well, I will ask you directly:

Q. Does the Survey of Hazards show on its

(Testimony of Ben Havner.)

face the coverage that was extended under the policy?

Mr. Bacon: Now, if the Court please, we are getting back to the same proposition. [23]

Mr. Taylor: Let me frame it this way, counsel; maybe you won't have any objection.

Mr. Bacon: This is not part of the policy and I don't believe that it can do any more than serve what it shows on its face. We didn't object to its introduction. It is not delivered to the insured; it is no part of the contract that we are concerned with here, your Honor. I see no reason for going into an explanation from the Plaintiff's point of view of what its function was so far as it is concerned.

Mr. Taylor: Maybe I can simplify it, your Honor.

The Court: Proceed.

Q. (By Mr. Taylor): Does the top part of the survey contain the identical figures and wording that appears on the face of the policy Defendant's Exhibit A? Do they correspond?

A. Yes, they do.

Mr. Bacon: Just a minute, Mr. Havner.

The Court: Let me see these.

Mr. Bacon: The document will speak for itself.

Mr. Taylor: I appreciate that.

Mr. Bacon: It isn't necessary for the witness to say what it contains in the way of information. It speaks for itself.

Q. (By the Court): This is the original policy?

A. That is the original policy.

(Testimony of Ben Havner.)

Q. What is this? [24]

A. This is our work sheet, our daily report, as it is called.

Q. Work sheet?

A. Yes, known as the work sheet or daily report.

Q. What relation has it to the original contract?

A. It is a copy of the original contract insofar as coverages and premiums are concerned, so that we know what is covered under the basic original policy. Instead of keeping an original policy in our files, we keep that abstract.

The Court: All right. For the purposes of this case, is it not a fact I am limited to this policy in relation to this case?

A. Yes, sir.

The Court: And must decide from this entirely?

A. Yes.

The Court: Is that clear?

Mr. Taylor: I didn't quite understand that.

The Court: Let the reporter read.

(The reporter read the remarks of the Court.)

The Court: That is the original policy?

Mr. Bacon: The original policy.

The Court: I said what relation has this document to the original policy, if any?

Mr. Bacon: It is their office record of this [25] policy. It doesn't, so far as I see, add anything.

The Court: That is what I am trying to develop here, whether it does or not.

Mr. Taylor: I think it does, your Honor.

The Court: In what respects?

(Testimony of Ben Havner.)

Mr. Taylor: It shows the computation and how the figures that appear under "Advance Premium" on the original were ascertained.

The Court: Do they get a copy of this?

Mr. Taylor: The agent gets a copy of it is my understanding.

Mr. Bacon: The agent is here. Mr. Havner says that copies were sent to the agent.

May I interject a question?

The Court: You may.

Q. (By Mr. Bacon): Mr. Knudsen was at the time of the issuance of this policy an agent of the plaintiff company; isn't that right?

A. Yes, he was.

Mr. Bacon: Copies went to the company's agent who solicited and obtained this business.

The Court: In any event, I will allow the documents themselves to speak for themselves. Let us proceed.

Mr. Taylor: Your Honor, in view of the opening statement of the defendant that the company accepted a premium for the [26] coverage that they claim it had, I think we should be permitted to develop just what was charged for by way of premium. That is the purpose of it.

Mr. Bacon: It shows on the document $40 for this property, on Exhibit 2.

The Court: So stipulated?

Mr. Taylor: Yes, yes; I will stipulate that it appears—that $40 deposit appears under the column entitled "B.I.", which signifies bodily injury,

(Testimony of Ben Havner.)

and it does not appear under the column entitled "P.D.", which signifies property damage.

Mr. Bacon: May I explain?

Mr. Taylor: Certainly.

Mr. Bacon: The basic policy is a general comprehensive automobile liability policy. We are now by this endorsement to which reference had been made adding other than automobile coverage—personal liability — comprehensive personal liability, and as I read to your Honor in the insuring agreement it picks up property damage liability. The only coverage concerned here is not automobiles but other properties of the defendant, and they are listed on here and premium charges made, and it is for the coverage provided by this endorsement because he doesn't get any under the basic policy for these properties.

Mr. Taylor: That is the argument of counsel. [27] I think I can develop otherwise.

The Court: What is your answer to that argument?

Mr. Taylor: Our answer is, your Honor, that this piece of property, the duck club, was rated under the basic policy under their rating procedure, and remembering that the basic policy has only bodily injury, the premium was charged in the rating under the basic policy for only bodily injury; that the $40 which was charged here is the charge shown by the rate books for bodily injury only. That is our position.

The Court: Is that true, gentlemen?

(Testimony of Ben Havner.)

Mr. Bacon: No, your Honor. May I ask the witness one question?

The Court: Surely.

Mr. Bacon: Or two. Maybe we can clarify this as we go along.

The Court: That is the best way to do.

Q. (By Mr. Bacon): Mr. Havner, isn't it a fact that when the information was provided the company with respect to the defendant's properties for which insurance was sought that this particular property with which we are concerned was considered by you as vacant land at that time, and you had no rate to charge it—there isn't any charge for it?

A. We rated it and charged for it as a duck club.

Q. Did you not do that arbitrarily? [28]

A. No.

Q. I mean, when you picked the rate out, you didn't have in mind that the operation was any different than you understood it to be.

A. We understood that the doctor was operating a duck club, and it was so rated.

Q. And that premium was charged and that was in connection with the coverage provided by this endorsement, wasn't it?

A. No, by the basic policy.

Q. Mr. Havner, the basic policy—that is what I am asking you—is the comprehensive general automobile liability policy, isn't it? A. Yes.

(Testimony of Ben Havner.)

Q. And there wouldn't be any coverage without this endorsement on any of these properties?

A. There would be coverage for the duck club without endorsement.

Q. Would there be coverage for the ranch?

A. Yes.

Q. Would there be coverage for the other real properties owned here and rented out?

A. May I correct that? The ranch, as I recall, was covered under what we call the comprehensive personal section.

Q. That is the endorsement we are talking about, isn't it? A. That is right. [29]

Mr. Taylor: May I continue?

The Court: Surely.

Q. (By Mr. Taylor): Let me ask you this one general question in reference to the Survey of Hazards. Is there any reference on the Survey of Hazards, Plaintiff's Exhibit 1, with reference to the duck club?

A. There is nothing on here with reference to it, no.

Q. All right.

A. But there is on the——

Q. Showing you Plaintiff's Exhibit No. 2, which is entitled "Extension Schedule", the land in question, which is the subject matter of this suit, is rated on the Extension Schedule, is it not?

A. Yes, it is.

Q. And what is the title of the rating?

A. It is rated as a duck club under what we

(Testimony of Ben Havner.)

call the Owners, Landlords and Tenants Manual, which refers to business activities and is coded as a business activity, and coverage is provided only for bodily injury.

Q. All right. Now you say it is coded——

Mr. Bacon: Just a minute. I move to strike out that answer as a conclusion of the witness.

The Court: I understand.

Mr. Bacon: He says coverage only of bodily injuries provided and that is his conclusion. [30]

The Court: That may go out.

Q. (By Mr. Taylor): You say it is coded. Where do you find that code figure on the Extension Schedule, for the record?

A. The code is shown as 113.

Q. Do you have with you a rating manual?

A. Yes, I have.

Q. Are you familiar with the use of the rating manual? A. Yes.

Q. And could you look up the code 113 in the rating manual? A. Yes, I have it here.

Mr. Bacon: Before we use this document, I don't know what this book is or what its purpose is or where it comes from.

Mr. Taylor: I will ask him.

Mr. Bacon: Or who prepared it. I don't know anything about it.

Mr. Taylor: I can only ask one question at a time.

The Court: You can inquire.

Mr. Bacon: No, I mean if the witness is going to testify from it, I think we should have some idea what it is.

(Testimony of Ben Havner.)

Mr. Taylor: We certainly will, counsel.

The Court: What is that you have in your hand?

A. This is a manual provided by the National Bureau of Casualty Companies and it provides the basic rates and [31] premiums on which our premium charges are made.

The Court: Proceed, counsel.

Q. (By Mr. Taylor): All right. Now do you find the code 113 in the manual? A. Yes, it is here.

Q. All right, under what general classification is it?

A. It is listed as "Clubs not otherwise classified".

Mr. Taylor: May I have it just a moment, counsel? Have you seen this?

Mr. Bacon: No.

Mr. Taylor: Counsel has now seen code classification 113. Can you explain it?

The Court: Read it.

Mr. Bacon: Wait a minute.

The Court: Read it, please.

Q. (By Mr. Taylor): All right, read the pertinent portions.

A. "Clubs not otherwise classified, including lodges, fraternal orders and sororities, excluding the handling or use of or the existence of any condition in goods or products handled after the insured or any concessionaire of the insured has relinquished possession thereof to others."

To that are added various other activities in con-

(Testimony of Ben Havner.)

nection with a club and personal purchases, but that is the general basic classification. [32]

Q. All right. What is the rate, or what was the rate as of the time of the issuance of this policy under the classification of 113 for clubs?

A. Well, the rate of that I couldn't tell you, but the minimum premium which we charge is $25 and it is still $25.

Q. What does a minimum premium mean?

A. That is the minimum amount for which we will accept that particular type of coverage.

Q. And when you charge the minimum premium of $25 under code 113, what coverage are you talking about?

Mr. Bacon: Just a moment. That I think again invades the function of the Court here. This manual has been read into the record. Your Honor heard it. It speaks for itself. They provide what that says. I presume—I don't know—it is just the rating.

The Court: Neither do I. I am going to allow it to go in subject to a motion to strike and over your objection.

Proceed.

Q. (By Mr. Taylor): You mentioned a $25 premium as a minimum. What coverage does that $25 provide?

A. It provides bodily injury.

Q. And when you say $25 for bodily injury, how much—what would be the limit of bodily injury that the $25 would provide?

(Testimony of Ben Havner.)

A. Five thousand each person, ten thousand each accident. [33]

Q. All right. Now assume that an insured, instead of getting $5000 worth of insurance as you have indicated, wants $300,000 of bodily injury insurance, what would the rate be?

A. It would be increased 60 per cent. Another $15 would be added.

Q. So what would the rate be for $300,000 worth of bodily injury insurance? A. $40.

Q. All right. Now what is the rate for property damage, assuming someone wanted property damage under the code 113?

A. The minimum premium at that time, and still is, is $15 for property damage.

Q. And $15 would provide how much property damage?

A. At the time the policy was written it would provide $1000 only.

Q. And if someone wanted $300,000 worth of property damage insurance, what would the premium be, Mr. Havner?

A. I would have to—I will look here and check it for you if you wish. I don't want to hold up the Court.

Your Honor, the increased limit for property damage is not available at the moment, but it would be a substantial increase as it was under bodily injury.

Q. Can you supply that at a later time?

A. Yes, I can.

(Testimony of Ben Havner.)

Q. (By Mr. Bacon): Is that under the same code number? [34] A. Yes, it is.

Q. (By Mr. Taylor): All right. Now, showing you Plaintiff's Exhibit 2, you have under "Estimated Premium", $40, and underneath that you have the word "Deposit"; is that not correct?

A. That's right.

Q. And what does that $40 cover?

A. It covers bodily injury in the amount of 300,000 each person, 300,000 each accident.

Q. Does it cover any property damage?

Mr. Bacon: If the Court please, that is asking the witness to answer the question that we are going to ask the Court to answer.

The Court: I am going to allow it to go in subject to a motion to strike and over your objection.

Mr. Taylor: Do you have the question in mind? Do you want to read it back?

(Question read.)

The Witness: Do you want me to answer that?

The Court: Yes.

Mr. Taylor: Yes, you are permitted.

A. The $40 premium doesn't cover any property damage.

Mr. Bacon: If the Court please, I move to strike the answer on the ground that it is a conclusion of the witness.

The Court: You may renew your motion at the [35] time we conclude. Make a notation of it.

Q. (By Mr. Taylor): Calling your attention to

(Testimony of Ben Havner.)

the last item on Plaintiff's Exhibit 2, what does that show—the one at the bottom?

A. It shows a charge of $8 for bodily injury with respect to dentist's or physician's office located at 230 Grand Avenue, Oakland.

Q. And what is the code as shown on the exhibit for the physician's office?

A. Code 117, taken from the Owners, Landlords and Tenants Manual.

Q. It is taken from the same portion of the manual as 113? A. Yes, it is.

Q. Can you turn to 117 of the manual?

Mr. Bacon: May I ask a question before we proceed here?

Q. You referred, Mr. Havner, to Owners, Landlords and Tenants Manual.

A. That's right.

Q. Is that what this manual is?

A. Part of it, yes.

Q. Well, what is the other part?

A. Well, part of it refers to comprehensive personal liability coverages in separate sections; some of it is manufacturer's and contractor's coverage. There are various sections.

Q. The portions to which you have referred and [36] are now referring have to do with the Owners, Landlords and Tenants code?

A. Codes 113 and 117 do, yes.

Q. And you have in the manual some other rules or provisions or regulations, whatever they may be,

(Testimony of Ben Havner.)

with respect to general comprehensive liability policies; is that correct?

A. No, this applies to all policies regardless of form.

Q. But you mentioned Owners, Landlords and Tenants policies. A. That's right.

Q. And we are not concerned with that policy here, are we?

A. The comprehensive general liability policy includes many coverages including owners, landlords and tenants coverage.

Q. That is a blanket coverage?

A. That is right.

Q. (By Mr. Taylor): To clarify a little bit of that, that manual that you have is broken down into various subdivisions as indicated by the tabs?

A. That's right.

Q. And if I understand you correctly, code 113 and code 117 which you are now looking up come under the Landlords—Owners, Landlords and Tenants portion of the classification of the manual?

A. That is correct.

The Court: Read 117. [37]

Mr. Taylor: 117.

A. Well, classification 117 is entitled "Physician's Offices. Minimum premiums bodily injury, $5; property damage, $1."

Q. All right. Now I believe the Extension Schedule shows a premium of $8.

A. That's correct.

(Testimony of Ben Havner.)

Q. For the physician's office. And in what column does that $8 show itself?

A. In the column headed "B.I.", which stands for bodily injury.

Q. How did you arrive at the figure of $8 as a premium for the doctor's business?

Mr. Bacon: If the Court please, I may be having a little difficulty here, but I don't understand the significance of the doctor's office. We have multiple coverages here, and we are concerned only with one piece of property. Now we are going in to the doctor's office, which is not involved.

The Court: Indicate the purpose for the record.

Mr. Taylor: Your Honor, if counsel is contending the doctor's occupation, being a doctor, is not a business,—if he is going to contend that the doctor's office is not part of his business, then the doctor's activities would come under the endorsement. We are trying to show that insofar as [38] the rating was concerned, the doctor's office, I think it is admitted, is a business enterprise.

The Court: No doubt about it.

Mr. Taylor: I don't think there is any doubt in the world about it. It was rated under 117, this one classification. The duck club was rated under the same classification, and we contend that it was rated as a business enterprise just the same as the doctor's office.

The Court: Proceed.

Mr. Taylor: I think the question was: How did

(Testimony of Ben Havner.)

you arrive at the $8 premium for the doctor's office under 117?

A. There was a minimum of $5 for $1000 of coverage—I mean for five thousand and ten thousand coverage, increased by $3 to bring it up to 300-300.

Q. So that by charging $8 you afforded bodily injury coverage up to $300,000?

A. That is correct.

Q. At the doctor's office? A. Yes.

Q. Does that show or did you charge any premium for property damage at the doctor's office?

A. No.

Mr. Taylor: I have no further questions. I think it is just about recess time.

The Court: We will take a recess. [39]

(Recess.)

The Court: Proceed, counsel.

Cross Examination

Q. (By Mr. Bacon): Mr. Havner, I am going to refer to Plaintiff's Exhibit No. 2 which is called an Extension Schedule and to which you have heretofore referred in your testimony.

A. Yes, sir.

Q. Will you tell the Court, please, what is meant by a flat charge?

A. Usually it is a charge not subject to further adjustment. Some charges are adjusted later at the end of the policy period or during the policy period, but usually a flat charge is a fixed premium regardless of the period of coverage.

(Testimony of Ben Havner.)

Q. (By the Court): Fixed?

A. That's right.

Q. (By Mr. Bacon): And when that term appears on this Extension Schedule under the column "Rates", that means, where it is identified by bodily injury and P.D., it is a flat charge for both; is that correct?

A. No, it does not mean that.

Q. What does it mean, then?

A. It means a flat charge was made only for bodily injury in this particular case.

Q. I would like to ask you then what is meant [40] by the appearance down here of a rate. I see a figure down here after the item 230 Grand Avenue, physician's office, and I see a rate for bodily injury in that report there.

A. That is correct.

Q. That is .896? A. That is correct.

Q. And that is the bodily injury rate?

A. That is per hundred square feet; that is what it is.

Q. On the doctor's office?

A. That is correct.

Q. And nothing appears in the P.D. column.

A. That is right.

Q. And when you put a flat charge in both columns, you say it is confined to bodily injury?

A. The coverage only applies to the lines for which a premium charge is made. The only premium charge on there is under bodily injury column with respect to the doctor's office.

(Testimony of Ben Havner.)

Q. But here in this column you have only the words "estimated premium"?

A. That is correct.

Q. And the estimated premium in each instance where you have a flat charge appears only in one column.

A. That's right.

Q. But it includes property damage, does it not, also? [41]

A. That expression "flat charge" applies only to the amount of premium charged; it has nothing to do with the rates.

Q. What does "-incl" mean in the property damage column?—that word right there.

A. That means "included".

Q. And that means that that property damage is included?

A. For those classifications.

Q. In this charge? A. That's right.

Q. Which is a flat charge?

A. That is correct.

Q. And it is correct, is it not, that that term, "flat charge", appears opposite the item which you have listed on your extension as duck club rated as —it appears flat charge, doesn't it?

A. With respect only to the bodily injury premium.

Q. But it appears "flat charge" in the rate column, does it not; that is correct?

A. Yes, it is in the rate column.

Q. And just as in the other columns, the item

(Testimony of Ben Havner.)

of the estimated premium appears in the B.I. column only? A. That's right.

Q. And that is true of all these, isn't it, premium charges? [42]

A. The premium charge is there. Where the property damage is included we have so indicated on the work sheet.

Q. Yes. But the flat charge that you have indicated here appears opposite all of these with the exception of the doctor's office?

A. That is correct.

Q. There was no request for property damage coverage so far as the doctor's office was concerned, was there? A. Not that I know of.

Q. If there had been, you have a rate you would have put in there?

A. I would have put the rate in there.

Q. And the reason for that, I take it, Mr. Havner, would be that there would be no property damage exposure in a doctor's office.

A. No, I didn't say that.

Q. Well, isn't that usual? Do you ordinarily write property damage coverage?

A. We do write it, yes.

Q. On a physician's office?

A. We do very often.

Mr. Bacon: The manual that was used—did that go in for identification at least, or may it be left here?

Mr. Taylor: Surely.

Mr. Bacon: We would like to have it identified

(Testimony of Ben Havner.)

[43] and put in as a defendant's or plaintiff's exhibit, either one, for identification. We may not need to put it into evidence.

The Court: He can familiarize himself with it.

The Clerk: Plaintiff's Exhibit No. 3 marked for identification.

(Whereupon manual referred to above was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Bacon): The document to which I have just referred, which is Plaintiff's Exhibit No. 2, Mr. Havner, this Extension Schedule, that is not attached to the policy, is it?

A. No, it is not.

Q. And it is not delivered to the insured, is it?

A. No; it is delivered to the agent.

Q. It doesn't become his property at all?

A. Not unless he asks for it. It is available to him; it is not customary to deliver it to him.

Mr. Bacon: That is all, your Honor.

Mr. Taylor: May I call Dr. Ivey?

DR. EVERETT D. IVEY

the defendant herein, called as a witness by the plaintiff, sworn.

Q. (By the Court): Your full name, please?

A. Everett D. Ivey. [44]

Q. (By the Court): Where do you live?

A. My home is at 46 Hardwick Avenue, Piedmont.

Q. Your business or occupation?

(Testimony of Dr. Everett D. Ivey.)

A. My business is 230 Grand Avenue and I am a physician.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Taylor): Dr. Ivey, you have in the past purchased property in Colusa County, have you not, sir? A. Yes.

Q. Now it may help you to refer to your income tax returns on some of these things I am going to ask you. If so, I am perfectly agreeable to have the record straight; but before we get in to the returns, could you tell me how many parcels of land you purchased in Colusa County?

A. Up to what time, please?

Q. Well, up until, say, the first of January of 1954.

Mr. Bacon: Assuming this risk started in 1951, it would seem to me we are interested only in what the situation was from 1951 on through this policy period, through '54. I don't know how far back counsel intends to go.

Mr. Taylor: My purpose, your Honor—we know from the deposition that the first purchase was either in 1946 or 1947. Naturally we are not going behind that. It is our purpose to show that this is a business enterprise that grew from a small beginning to a large enterprise. [45]

The Court: For that limited purpose I will allow it. Maybe we will get a stipulation. Is this a business activity?

(Testimony of Dr. Everett D. Ivey.)

Mr. Bacon: Well, it probably takes on—I don't know just what it means by a business activity.

The Court: The recital of counsel indicates here——

Mr. Bacon: It is a losing proposition.

The Court: From his opening statement I would conclude and accept his word for it that it was a business activity.

Mr. Bacon: If there was any intent on the part of the insured here, the doctor, I am sure it was not to make it a business enterprise out of this. I don't know what interpretation we are going to put on it.

The Court: Did you hear the statement of counsel here about you taking on patrons up there beginning at a hundred and how much?

Mr. Bacon: That is right.

Mr. Taylor: The original fee for shooting privileges, as I recall, was $150.

The Court: It went up to three hundred and something.

Mr. Taylor: Then it increased and some were charged three hundred.

Q. (By the Court): Is that true?

A. It was increased to $200 on part of the property and $300 from the time I bought the last piece of property.

Q. Well, that is a business activity, isn't it? [46]

A. You will have to define that, your Honor. There was money involved.

The Court: I am trying to get help.

(Testimony of Dr. Everett D. Ivey.)

The Witness: There was money involved; there was income and expenses.

The Court: Certainly, all business has income and expenses. Proceed.

Mr. Taylor: I will see if counsel will stipulate that this is a business activity, we can eliminate an awful lot of questioning on what the activity was.

Mr. Bacon: Well, I am satisfied in my own mind that it is, but I didn't want to put the defendant in the position of operating in a business enterprise when he had no intention of doing it, and his purpose was to assist him in his expenses.

The Court: You may develop that fact on cross examination. [47]

Mr. Taylor: My question was, how many pieces, how many parcels of land did you purchase from the date of the beginning up until January 1st or January 15th, 1954, when this policy terminates? First, just how many?

Mr. Bacon: Let me shorten it then, your Honor. We will stipulate that this was in the sense that——

The Court: Counsel indicated——

Mr. Bacon: Not as counsel indicated, but it was a business enterprise in the sense that charges were made for shooting privileges and expenses exceeding those charges in most instances were incurred. So if we can shorten this a little bit with that stipulation, we will make it.

Mr. Taylor: Will counsel go further and stipulate that this is a business activity within the meaning of the endorsement number one where it says

(Testimony of Dr. Everett D. Ivey.)

that "except it applies to the conduct of a business in which the named insured is the sole owner, the policy is amended as follows:"

The Court: Are you the sole owner up there?

The Witness: Yes, sir, your Honor.

Mr. Bacon: He is the sole owner. We will stipulate it is a business enterprise if counsel will stipulate that the insurance company knew all about it from the beginning, the whole operation up there; that Mr. Knudsen knew it and told the underwriters just what the problem was.

A. I can't; I don't know that. [48]

Mr. Bacon: Just what the properties were.

Mr. Taylor: I don't know how much my client knew about it, your Honor, and I can't stipulate that they were acquainted with the entire extent of the activities; I cannot do so.

The Court: Let us proceed.

Q. (By Mr. Taylor): Back to the number of parcels, Doctor, how many were there?

A. There were 6 transactions of which two of those involved two separate parcels. That was just —in other words, when the deeds came through it was divided in two parts, although they were part of the transaction.

Q. How many transactions were there altogether? A. I guess you would call it six.

Q. Six transactions? A. Yes.

Q. All right; briefly, the year of the first one?

A. 1947.

Q. And how many acres were involved?

(Testimony of Dr. Everett D. Ivey.)

A. Thirty-six and a fraction.

Q. And the seller? A. Charles F. Lambert.

Q. Lambert? A. L-a-m-b-e-r-t, yes.

Q. And the cost roughly, in round figures?

A. $5,000.00. [49]

Q. Did you give that 36-acre tract a name so that we can refer to it later on?

A. It had a name when I bought it; two lakes, one was Beach and the other Napa. Somebody else had named it; I didn't name it.

Q. We will be referring to it later on. How do you designate the 36 acres?

A. Beach-Napa.

Q. When you purchased it how many blinds did it have on it? A. None.

Q. Did you during the course of your ownership put in blinds? A. Yes.

Q. How many? A. Five.

Q. And on Beach-Napa, did you put in any levies, improve it with levies and cross-levies and gates? A. Yes, a small levy, yes.

Q. Your next parcel, Doctor, what is the date of purchase? A. 1947.

Q. And the number of acres?

A. Approximately 171.

Q. And the seller? A. The same, Lambert.

Q. Does that have a name or designation?

A. Tule Lake. [50]

Q. Tule? A. Tule, T-u-l-e.

Q. And the cost? A. Eighteen thousand.

(Testimony of Dr. Everett D. Ivey.)

Q. When you purchased it, did it have any blinds or barrels? A. A few rough blinds, yes.

Q. Did you improve that with blinds?

A. Yes.

Q. How many did you put on?

A. Oh, I would have to estimate; maybe 12 or 15.

Q. And did you improve it with levies and dikes and cross-levies? And gates for irrigation?

A. Somewhat, yes.

Q. The next parcel, the date of purchase?

A. I can't be sure. It was 1948, I believe, when I purchased 12 acres to add to the Tule Lake property, which was contiguous and adjacent.

Q. And the seller? A. Charles Lambert.

Q. And did you give that a name or was that a part of Tule?

A. Just called it Tule south to designate it in my records.

Q. And the cost?

A. I think it was $560.00.

Q. When you bought it were there any blinds or barrels on it? A. No. [51]

Q. Did you install barrels or blinds?

A. Yes.

Q. How many, roughly?

A. Two double blinds, four barrels.

Q. Two double blinds would be place for four shooters? A. Yes.

Q. Did you put in levies? A. Yes.

Q. And cross-levies? A. Yes.

(Testimony of Dr. Everett D. Ivey.)

Q. The next parcel, Doctor? A. East Bangs.

Q. The year of purchase? A. 1950.

Q. Number of acres? A. Eighteen.

Q. The seller? A. Lambert.

Q. And you called that East Bangs?

A. East Bangs, yes.

Q. B-a-n-g-s? A. Yes.

Q. The cost? A. Three thousand.

Q. When you bought it, did it have any blinds or barrels? [52]

A. I think it did, yes. I changed the blinds around.

Q. You changed them around? A. Yes.

Q. And you replaced them?

A. And replaced them.

Q. How many did you put in in blinds or barrels? A. Two double blinds, four barrels.

Q. Did you put in levies and cross-levies for irrigation?

A. No, that was fully constructed.

Q. And the next purchase, the date?

A. At approximately the same time a beach that had been known for years as Tin Can Louie, 83 acres.

Q. Eighty-three? A. Yes.

Q. And the seller? A. Lambert.

Q. You call it Tin Can Louie? A. Yes.

Q. And the cost? A. Forty-five hundred.

Q. When you purchased it, did it have blinds or barrels? A. Two double blinds, yes.

Q. And did you put in more?

(Testimony of Dr. Everett D. Ivey.)

A. I put in one more.

Q. So it ended up with a total of three doubles?

A. Yes.

Q. Did you put in levies and cross-levies?

A. One or two small ones, yes.

Q. And the next purchase?

A. Was the piece of property known as North Peat's Lake.

Q. And the number of acres?

A. That was one of the properties that had two parcels, 133 acres in one and 2 acres off to one side —one transaction.

Q. Total of 135? A. Yes.

Q. And the seller? A. Garlan Eple.

Q. And the cost? A. Twenty-five thousand.

Q. When you bought it did it have any blinds or barrels?

A. Yes, it had quite a number on there.

Q. How many?

A. I would say 8 or 9 doubles, I would think.

Q. Did you add any to it?

A. Yes, I did; I put in a number of barrels and a couple of doubles.

The Court: What are barrels?

A. Pardon?

Q. You said "barrels."

A. Tanks; they are barrels to sink in the ground.

Q. They sink in the ground?

A. Yes, you have to bury them so that it doesn't show above the water, so when you get down in

(Testimony of Dr. Everett D. Ivey.)

the barrel, ducks can't see anything abnormal on the surface of the water.

Q. Does the shooter get down in the barrel?

A. The shooter gets down in the barrel so he is about on a level with the top of the water and puts a little camouflage around him, and presumably the ducks can't see him.

Q. He sneaks up on the ducks?

A. They sneak up on him.

Q. (By Mr. Bacon): You mentioned double barrels. Is that a space for two shooters?

A. Two barrels side by side.

Q. Two barrels side by side? A. Yes.

Q. (By The Court): Are these various pieces of property all in one now; that is, they are adjacent to each other?

A. Three of those—Beach-Napa, East Bangs and Tin Can Louie—contact each other. Tule and Tule South are in a different area. This last piece I am speaking about was 4 or 5 miles separate.

Q. More than one shooting range, then, was there? A. Yes, three.

Q. (By Mr. Bacon): So you have actually three locations so to speak? [55] A. Yes.

Q. (By Mr. Taylor): What improvements did you put in at North Peat's? What was the total capacity, roughly?

A. Can I have a moment, please?

The Court: Oh, just approximately.

Mr. Taylor: Just approximately. You started out with eight or nine doubles.

(Testimony of Dr. Everett D. Ivey.)

A. Yes. I would say 20 barrels, perhaps. That would include two doubles; it would be figuring two for each double, perhaps.

Q. There were at least 20 barrels?

A. I can figure it up if you want me to.

Q. What?

A. I can figure it up if you wish.

Q. Well, it is not that important. Did you put in levies and cross-levies and gates at North Peat's?

A. Yes.

Q. All right. Did you put up any buildings any place?

A. No, not on any of these properties, no.

Q. Did you put up any buildings on any other properties where the buildings belonged to you?

A. Yes, on a building site set aside for duck hunters, on which we were given free land if we cared to put up the buildings, entirely removed from these properties.

Q. All right. Now, just tell me generally what buildings [56] you put up.

A. Six surplus buildings bought from the Government.

Q. And could you tell me the approximate cost? Maybe now is a time to get your income tax returns.

A. A cost of five small buildings was $120.00 apiece before hauling, and the large one, as I recall it, was $300.00.

Q. And the hauling?

(Testimony of Dr. Everett D. Ivey.)

Q. (By The Court): Does it cost that much to haul them? A. Yes, it did.

Q. (By Mr. Taylor): I imagine the hauling was more than the original cost, wasn't it, Doctor?

A. On the small buildings, a trifle more, yes.

Q. And do you remember what the hauling amounted?

A. They needed some repairs. I estimated each building cost me $275.00 on the small buildings.

Q. In place? A. In place.

Q. And the large one cost you what in place?

A. Perhaps a thousand.

Q. Did you from time to time install any furniture and fixtures and equipment such as stoves in any of the buildings or cabins?

A. These buildings were put there with the thought that if the people cared to shoot, they would have a roof over their head; electricity was connected to the buildings, not for [57] heating; there were bunks put in. Any heating that they had or any cooking or any other utensils were all supplied by the men who happened to choose to stay there while they were shooting; I had nothing to do with that.

Q. You furnished the electricity?

A. The electricity is all.

Q. The P.G.&E. charged you? A. Yes.

Q. How about water?

A. That was free for a time, because this area was set up as the Willow Creek Mutual Water Company, and they had a central pumping station

(Testimony of Dr. Everett D. Ivey.)

and water ran by in front of the cabins of which there are perhaps now 75 in that area and water then was tapped off as we wished it, so there was no charge at first. The last couple of years there has been a slight charge for water.

Q. Any charge for water since January 15, 1954?

A. There have been two years' charge, this year and last year.

Q. And when there was a charge, you paid for it? A. Yes.

Q. It was billed to you? A. Yes.

The Court: What is the purpose of this detailed testimony? [58]

Mr. Taylor: To show the extent of the operation, your Honor.

The Court: The extent of the operation?

Mr. Taylor: Yes, the extent of this business operation. I want to show that he bought equipment, the types of equipment and the cost. I want to show the capital invested.

The Court: For what purpose?

Mr. Taylor: To show that this is a business enterprise.

The Court: Well, I think it was stipulated——

Mr. Taylor: I didn't get the stipulation that it was a business enterprise.

Mr. Bacon: We have stipulated that this is a business enterprise.

Mr. Taylor: Within——

(Testimony of Dr. Everett D. Ivey.)

Mr. Bacon: I am not going to go any further; I have stipulated it is a business enterprise.

Mr. Taylor: In which Dr. Ivey is the sole owner?

Mr. Bacon: Yes, that Dr. Ivey is the sole owner, yes * * * at a loss.

The Court: Well, that is life, after all.

Mr. Bacon: It is just life.

Q. (By The Court): You enjoy it up there, do you? A. Not any more.

Q. Aren't you located up there any more?

A. Well, I have had too many troubles. [59]

Q. Did you quit the activity entirely?

A. No; I have disposed of all of my property except one small piece I have in this 135 acres that I mentioned. And I might say while I spent some time up there before, my business of medicine has always come first and always had to be attended to before I could find time for the other—if that explanation has any merit to it.

Q. Tell me, have you been up this season to shoot some ducks? A. I was up once only.

Q. And is it a fair question to ask you how many ducks you brought back?

A. I didn't get a duck.

Q. That is the reason I asked you. This is a bad year, in any event, wouldn't it be, in this kind of weather?

A. So I hear, yes. There have been many reports of poor shooting.

The Court: Proceed.

(Testimony of Dr. Everett D. Ivey.)

Mr. Taylor: All right; we will get on to another subject.

Q. Did you tell Mr. Knudsen what your gross income was from this enterprise or business activity for the year 1950?

The Court: Maybe you can get a stipulation on that, counsel, if there isn't any question about it.

Mr. Bacon: No, we——

The Clerk: You might sit there—— [60]

Mr. Bacon: No. My understanding is——

Mr. Taylor: Maybe he did and maybe he didn't.

Mr. Bacon: What he told was his gross income in early years, I cannot say. Mr. Knudsen is here but he is excluded.

The Court: Very well.

Mr. Bacon: Our position is, as we understand it to be, that a full disclosure of all these properties they have talked about appear on this list anyway.

The Court: Proceed, counsel.

Q. (By Mr. Taylor): Did you tell Mr. Knudsen the gross amount of your income for the year 1950?

A. That was six years ago; I don't recall. I know I went into great detail on all of the smaller businesses, if they may be called such, in which I had some money invested and gave him all the details about those. I don't recall whether I gave him the figures of how much I earned or collected or anything of that kind.

(Testimony of Dr. Everett D. Ivey.)

Q. When were you first notified of a claim against you in connection with——

A. I was served with a notice in February of 1954. I was served with a—I guess it was a complaint; I don't know the legal terms; at least an officer delivered a document to my office.

Q. You were served with a summons and complaint when? [61]

A. I believe it was February, 1954.

Q. Was that your first notification—Strike that. The plaintiff in that case was a Mr. A. Brian; is that not correct? A. Yes.

Q. And was that your first notification that Mr. Brian was making a claim against you?

A. The first definite information.

Q. Did you have any information that Mr. Brian had suffered a loss before February of 1954?

A. Yes.

Q. And when were you first notified that he suffered a loss?

A. The latter part of 1953; I can't give you the date.

Q. Can you tell me approximately when?

A. It may have been the latter part of November or December; I cannot say.

Q. And how did Mr. Brian notify you?

A. An attorney wrote me a letter saying that he had had some damage—that Mr. Brian had some damage.

Q. Was this an attorney for Mr. Brian?

A. Yes.

(Testimony of Dr. Everett D. Ivey.)

Q. And he wrote you a letter? A. Yes.

Q. Did you remember the date of it?

A. No, I don't remember the date.

Q. Would you remember the month? [62]

A. I have just stated it was approximately—apparently in the latter part of November or early December; I am not sure of the date.

Q. And was that the first notification to you that Mr. Brian had had any damage?

A. Any official notification. He had allowed a hunting lake by the owner of the property to be set up in the middle of his rice fields, and that had leaked out of there and it was obvious he hadn't been able to harvest his rice. If you are asking for official notification, the letter from the attorney was the official notification.

Q. Well, we don't intend to try that case over again, Doctor. A. I have to differentiate.

Q. Did Mr. Brian ever get in touch with you in any form before November or December of 1954 and notify you that he had had some damage?

A. Yes, he put through a telephone call. Again I can't recall that date; it must have been about the latter part of November.

Q. The latter part of November?

A. I would think so; I can't recall. I would give it to you definitely if I could.

Q. All right. Anyway, it was a telephone call from Mr. Brian? A. Yes. [63]

Q. A long distance call or was he down here?

A. Yes, a long distance.

(Testimony of Dr. Everett D. Ivey.)

Q. And did he tell you that there had been some damage to his property? A. Yes.

Q. And did he tell you that the water had come from a ditch supplying your land?

A. Yes, he told part of the information. May I add something to it?

The Court: You may.

Q. (By Mr. Taylor): Didn't he make a claim against you and tell you it was your fault?

Mr. Bacon: If the court please, may I put in an objection at this point. I don't know the purpose of this line of questioning, but it is my understanding that it probably had something to do with notice.

Mr. Taylor: Of course.

Mr. Bacon: And the company has admitted the policy was in effect; they are not charging any breach of it, they are saying there is no coverage.

I don't see that this is pertinent at all to the issues in this case.

Mr. Taylor: I think we can be permitted to develop this, your Honor. The purpose will become self-evident.

The Court: What is the purpose? [64]

Mr. Taylor: As to when he first notified this insurance agent, for example.

Mr. Bacon: As I say, it is not within the issues that are claimed by the pleadings. There is no claim that there was a breach of any of the policy provisions with respect to notification. The com-

(Testimony of Dr. Everett D. Ivey.)

plaint merely alleges that there is no coverage, and that is our issue, your Honor.

Q. (By Mr. Taylor): All right, let me ask you this question. When you were first notified of this, Doctor, you didn't think that your insurance covered it, did you, Doctor?

A. I don't understand insurance policies or insurance——

Mr. Taylor: Just a minute. I think that should be answered "yes" or "no" and then explain.

A. When I looked at that——

Q. Please, Doctor. Can you answer the question and then go into the explanation? A. O.K.

Q. Do you have the question in mind or shall I have it read?

Mr. Bacon: Well, I don't know whether the question is proper: Did you think you were covered; I don't think it makes any difference; I think it is incompetent and irrelevant and immaterial.

The Court: I will allow it.

Mr. Bacon: However, I don't want to preclude it.

The Court: It is a preliminary question. [65]

Mr. Taylor: Do you have the question in mind?

The Court: Read him the question.

Mr. Taylor: All right.

Q. When this matter of this claim of Mr. Brian's first came to your attention, you didn't think that your insurance covered it, did you, Doctor?

A. I didn't know; I looked at that policy, and on the front of it it said "No coverage, no coverage"

(Testimony of Dr. Everett D. Ivey.)

across the front. I looked inside and there was no listing of property; it looked like I was paying a big premium and getting nothing as far as the policy was concerned until I began to check it.

Q. All right. Understanding your answer, your policy said under Property Damage "No coverage" when you looked at it; is that right?

A. On the front page, yes.

Q. All right. When did you first notify Mr. Knudsen?

A. About the time when I received the legal summons.

Q. That was some time in February?

A. I believe it was, yes.

Q. So that you didn't notify your insurance agent between the time that you had your telephone call from Mr. Brian and when you received the letter from Mr. Brian's attorney; up until the time you were served you did not notify Mr. Knudsen?

A. The reason——

Q. That is true, isn't it? [66]

A. No; but there was a reason for that; I would like to tell you the reason.

Q. All right; you can give the reason, but I first want you to tell me whether or not——

A. I did not, no.

Q. All right.

A. And the reason was that this Mr. Brian when he called said there was a muskrat hole through the levy and the levy had leaked, and that that the time the ditch was being used it was being used by his

(Testimony of Dr. Everett D. Ivey.)

landlord who owned the property where he was growing rice, and I was not using the ditch that particular time. And in addition to that, I had an easement across the property and I had the word of the owner that if I used the ditch there would be no difficulty in my getting water. I thought the whole claim was something fabricated with no merit whatsoever, and that if I stated the facts and presented the easement to the other gentleman, that would be all there would be to it, which was done. So not understanding insurance policies, as I say, and having seen that front page which seemed to void all my expenditures, and in fear of the fact that there seemed to be no merit to the claim——

Mr. Taylor: I ask that that go out, as entirely not responsive.

The Court: He wants an opportunity to explain.

Mr. Taylor: When he says "voiding all liability he had— [67] I may say, your Honor—because that is what he thought.

Mr. Bacon: Yes. He had plenty of coverage; there was bodily injury there for which he was paying premiums.

A. Well, anyway, I felt there was no merit to their claim because it was not water from me that was doing the flooding, and I felt when that was explained that would take care of it, in view of the fact that I was within my legal rights in using the water. So I thought there was no merit to his claim whatsoever.

(Testimony of Dr. Everett D. Ivey.)

Q. You got a letter from an attorney in which he definitely made a claim against you, didn't you?

A. Yes, I did.

Q. And even though that was in November or December, you still didn't turn that over to Mr. Knudsen? A. No.

Q. When you did communicate with Mr. Knudsen was it by letter or by phone, or did you go to see him in person? A. I telephoned him.

Q. By telephone?

A. Yes, as I recall; I can't be too accurate.

Q. So you called Mr. Knudsen? A. Yes.

Q. And didn't he tell you that he didn't think you had coverage?

A. He told me he would have to investigate it.

Q. Didn't he use the words that he said he didn't think you had coverage?

A. I don't recall that he phrased it that way. He was conservative enough not to want to give me a positive answer until he investigated.

Q. Thank you.

A. I presume he writes many policies.

Q. He didn't come out and tell you, "Doctor, you have nothing to worry about. You are covered." He didn't say that, did he?

A. I don't recall that he did, no.

Mr. Taylor: I have no further questions at this time, your Honor.

The Court: Take the witness.

Mr. Bacon: No questions at this time.

The Court: Step down, Doctor.

Call your next witness.

Mr. Taylor: It is pretty close to the noon hour; I don't have a witness here. I didn't know that we would get through this fast. I didn't know that they were going to stipulate that it was a business activity and I thought we were going to have to prove a lot of matters from the income tax returns. If I am going to have another witness, I will have him here at 2:00 o'clock.

The Court: What is his name? [69]

Mr. Taylor: Pardon?

The Court: What is his name?

Mr. Taylor: I may bring a Mr. C. C. Thompson.

The Court: What will he testify to?

Mr. Taylor: Pardon?

The Court: What is the purpose of calling him?

Mr. Taylor: Mr. Thompson talked to Dr. Ivey early in this investigation, so to speak, and a court reporter took a statement from Dr. Ivey.

The Court: Have you got it?

Mr. Taylor: I have it. He wasn't under oath; it was an investigation, your Honor. That was made, I might say, under a reservation of rights, and it corroborates to a certain extent what the doctor said, and it is really not impeachment. That is why I say I might not call him.

Mr. Bacon: I don't see where there is any—He says "I wasn't certain"——

Mr. Taylor: If counsel will permit me to read this as what the doctor said shortly after the investigation was started, why, I will not call Mr. Thompson.

Mr. Chamberlin: What was the date of the investigation?

Mr. Taylor: This was March 9, 1954.

The Court: If you gentlemen want the witness to appear——

Mr. Bacon: I have no desire for the witness to appear. The statement is here. He could ask the doctor—I thought [70] he did cover it. That is the reason I am surprised when he said he did not.

The Court: He is entitled to this testimony if he wants to call the witness.

Mr. Bacon: He is entitled to Mr. Thompson's testimony.

The Court: Since it is nearly 12:00 o'clock, we will take an adjournment until 2:00 o'clock.

(Whereupon a recess was taken until the hour of 2:00 o'clock of the same day.) [71]

Thursday, November 29, 1956, 2:00 P.M.

Mr. Taylor: Your Honor, counsel have stipulated that I may read a question and answer without the necessity of calling the reporter and the party who interrogated Dr. Ivey. This was dated Tuesday, March 9, 1954.

"Q. Doctor, were you aware there might possibly be insurance coverage regarding your liability for this occurrence?

"A. I wasn't certain at all. As a matter of fact, I inquired a little bit, and my impression was it didn't cover it; otherwise, I would have notified you earlier. Finally I called Mr. Knudsen and he said

he didn't think it was covered. And then I talked to my friend, a Mr. Marsh, and later Mr. Knudsen called me back and said that there is a question. And that is where it stood. And so my knowledge of that was complete ignorance on what I was protected for."

The plaintiff rests, Your Honor.

Mr. Bacon: The defendant will call Mr. Knudsen as the first witness, Your Honor. [72]

DUNCAN H. KNUDSEN

called as a witness on behalf of the defendant; sworn.

Q. (By the Court): Your full name, please.

A. Duncan H. Knudsen.

The Court : And where do you reside?

A. In Lafayette, California.

The Court: Your business or occupation?

A. Insurance broker and agent.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Bacon): Mr. Knudsen, you are in the insurance business, you stated?

A. That's correct.

Q. What is your background? Will you tell us what your experience is in connection with the business of insurance?

A. Yes; I entered the insurance business in January 1936 after completing an education at the University of California I went to work at that time for the Royal Liverpool group, and was with them

(Testimony of Duncan H. Knudsen.)

nine and one half years, eight years of which I was branch manager of their Oakland office.

In 1944 I entered the agency business for myself and have been engaged in that same occupation since.

Q. And during the year 1951 and following for a period of time, did you have any connection with the United National Indemnity Company? [73]

A. Yes, I was——

Q. The National Fire Insurance Company of Hartford, Connecticut, and Transcontinental Insurance Company?

A. I was appointed an agent of the National Fire Insurance Company and the United National Indemnity Company in 1944, at which time actually the United National Indemnity Company started business.

Q. For how long did you continue as agent for the United National Indemnity Company?

A. I was a licensed agent for them through approximately 1955.

Q. And in your capacity as agent for the company, what in general are your duties and operations?

Mr. Taylor: Your Honor, I don't want to interrupt. I think possibly there is an agency contract which would spell out his rights and duties.

Mr. Bacon: It is admitted he was an agent.

Q. What did you do as such is what I want. What were your functions in serving as an agent?

(Testimony of Duncan H. Knudsen.)

A. To solicit business for the company, collect premiums, and as an agent you are given powers of assigning, of course, within the lines of business of the company rights; to act then as their representative in meeting the public in connection with the insurance business.

Q. And in that capacity did you meet Dr. Everett D. Ivey at [74] any time?

A. That is correct.

Q. When did you first meet him?

A. Late in 1950.

Q. What was the occasion of your meeting Dr. Ivey?

A. I was soliciting business for the account of this company and naturally for our office, and in the course of this I arranged a number of insurance contracts for Dr. Ivey.

Q. When you say "for this company" do you refer to the United National Indemnity Company?

A. I do.

Q. And its affiliated companies?

A. Correct.

Q. Did you obtain from Dr. Ivey information in connection with his insurance needs at that time?

A. That is correct.

Q. And what did you learn about the doctor's requirements?

A. Well, that he owned a number of properties as well as several vehicles, and for this reason then there was proposed a blanket contract to encompass

(Testimony of Duncan H. Knudsen.)

these various liability exposures. The doctor owned two houses in Piedmont and some farm property in Alamo. The two houses in Piedmont, I might add, were rented; a residence and a small amount of property in Hamburg on the north coast; some property in central [75] California near Willows upon which five or six residences were located; two or three other parcels of property which were vacant land and which during duck season were used for the purpose of shooting.

Q. And did you inquire what insurance protection was desired by the doctor, or did you recommend to him insurance protection in connection with those properties?

A. Yes, we proposed what is known as a comprehensive personal liability policy to which we would also include a blanket policy on the five or six motor vehicles. I don't recall whether there were five or six, but there were several.

Q. This was in what year, did you say?

A. 1951.

Q. And did you, as a result of those discussions with Dr. Ivey, obtain for him the insurance?

A. Yes, a policy was written.

Q. As discussed?

A. Was written in January of 1951 based upon these exposures.

Q. Do you have any record of that initial transaction of Dr. Ivey's?

A. Yes, I have a copy of what we term a daily

(Testimony of Duncan H. Knudsen.)

report, which is the agent's copy and likewise comprises the company's record, in my brief case.

Q. May we see that, please?

A. Yes. [76]

Mr. Bacon: I understand, Mr. Taylor, that the company does not have its own records.

Mr. Taylor: I might say they are looking for it. We did find the 1952 in the warehouse, which leads us to believe that this one is possibly there, too, and they are still looking.

Q. (By Mr. Bacon): You have handed me a document here, Mr. Knudsen, and I will show it to counsel first and then I will ask you some questions about it. (Exhibiting document to counsel.)

Mr. Taylor: We will stipulate, Your Honor, that that appears to be a copy of what is called the daily for the year 1951.

The Court: Let the record so show.

Q. (By Mr. Bacon): Mr. Knudsen, will you take the document and will you tell us what insurance was obtained as a result of your discussions with Dr. Ivey? A. All right. At this particular——

Mr. Taylor: We take exception, Your Honor. I thing it speaks for itself. We have no objection to it being offered in evidence as an exhibit. I think it would speak for itself, and inasmuch as Mr. Havner was allowed to explain what the items were, I think Mr. Mr. Knudsen could explain; but going beyond that, we would have to object, Your Honor.

Mr. Bacon: Mr. Havner was given considerable

(Testimony of Duncan H. Knudsen.)

Q. Was this policy that was issued at this time for the term January 15, 1951 to the same date in 1952 renewed?

A. Yes, it was, for several years and is still in force.

Q. When you obtained the information from Dr. Ivey regarding his properties and the insurance coverage he desired, with whom did you take up the information to obtain a policy?

A. With the underwriter at the Oakland office of the United National Indemnity.

Q. Did you have any contact with Mr. Ben Havner? A. No, sir.

Q. Regarding this policy? A. No, sir.

Q. Did you have discussions with the representatives of the company in the Oakland branch office regarding this insurance?

A. Yes, I did at the time of its placement.

Q. And at that time did you explain to them or disclose to them just what you wanted?

A. That is correct.

Q. And what did you tell them with respect to coverage [80] that you had advised Dr. Ivey to take? A. We provided them with the——

Mr. Taylor: Just a minute, please, Mr. Knudsen. I would like to interpose an objection that any conversations, Your Honor, that led up to the culmination of a written contract, would not be proper and it is a violation of the parol evidence rule. the contract being the final culmination of all negotia-

(Testimony of Duncan H. Knudsen.)

tions, the contract being in evidence speaks for itself.

Mr. Bacon: Well, of course if as claimed here and appears here, we have any repugnancy or any ambiguity with respect to whether coverage was or was not obtained, I think we are entitled to show what the parties sought for and intended to obtain and what was actually represented as given, and this man is an agent of the company, Your Honor.

The Court: I will allow it subject to a motion to strike again. In the event that you want to press that motion, I will hear it.

Mr. Taylor: Yes.

Mr. Bacon: I wonder if the reporter could find the question.

The Court: I may say to counsel I think his legal objection is good, but I was liberal in giving to him a lot of latitude. That is the only reason I am going to allow the testimony to go in under the conditions under which it is going [81] in now.

Mr. Taylor: May I make one further observation and objection, Your Honor: that no repugnancy, as counsel calls it, has been shown up to the present time and no ambiguity has been disclosed.

The Court: I agree.

Proceed, counsel.

Mr. Bacon: I would like if the reporter can find that question, if he will read it.

The Court: You may reframe the question.

Q. (By Mr. Bacon): Mr. Knudsen, when you

(Testimony of Duncan H. Knudsen.)

took the matter up with the Oakland branch office of the United National Indemnity Company to obtain that initial policy, did you discuss with the company representative there the coverages that you desired for Dr. Ivey?

A. Yes, I did. We requested the combination personal liability on the various properties I have described a few minutes ago.

Q. And was the subject of rates discussed at that time?

A. Yes, this subject did come up because of the fact that two of these parcels that I have mentioned did not have buildings on them and were vacant land. The question was asked whether—what they were used for, and the reply was that they were used for duck shooting during the duck season. The underwriter expressed some desire for a premium because [82] vacant land is ordinarily rated without a premium charge. There was then negotiated a flat charge to embrace these two parcels plus the parcel that had the six buildings located thereon, which is away from the other two.

Q. And when you mention a negotiated rate for those properties, what do you mean by that?

A. Well, I mean as opposed to a calculated rate, which would be a rate appearing in a manual providing a rate per location or per acre or per hundred dollars of receipts or whatever the measure might be. That is what we call a calculated rate. A negotiated rate would be an agreed premium nego-

(Testimony of Duncan H. Knudsen.)

tiated between the agent and the company as to a particular exposure.

Q. In the negotiation for and fixing of that rate was the subject of coverage discussed; that is, whether it included property damage or not?

A. It was assigned and rated under the comprehensive personal coverage which is a single limit insurance; in other words, including property damage and bodily injury liability.

Q. And what premium do you recall was——

A. It was in the neighborhood of $30; I don't recall exactly.

Q. And that was in the policy we have been discussing in 1951?

A. '51; correct.

Mr. Bacon: If there is no objection, or if there is, [83] we at least offer this in evidence as Defendant's next in order.

Mr. Taylor: No objection, Your Honor.

The Court: Defendant's Exhibit B admitted and filed in evidence.

(Whereupon document entitled "Survey of Hazards" was received in evidence and marked Defendant's Exhibit B.)

Mr. Bacon: And you have told us this policy was renewed in successive years.

A. That's correct.

Q. The year following, it was renewed, was it? You have the '52, do you, or shall I use Mr. Knudsen's copy? You have the '52, do you?

(Testimony of Duncan H. Knudsen.)

A. I believe I do. I have the '53—I have the '51; I do not have the '52 and '53.

Mr. Bacon: I wonder if we could see the '52, Mr. Taylor.

You have handed me some papers here, Mr. Taylor, which I presume you will stipulate are the company's records with respect to the policy referred to therein for the term January 15, 1952 to January 15, 1953 issued to Dr. Everett D. Ivey.

Mr. Taylor: That is correct; it is what is called the daily report for that year.

The Court: Let it be admitted and marked next in order. [84]

The Clerk: Defendant's Exhibit C admitted and filed in evidence.

(Whereupon daily report referred to above was received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Bacon): I show you, Mr. Knudsen, this group of papers which have been marked as Defendant's Exhibit C and ask you if you recognize what that is.

A. This would be the daily report representing the renewal policy following the one we just looked at; in other words, running for the successive year of '52-'53.

Q. And would that policy be the same as the policy that it superseded, the same type of policy?

A. Yes, it is identically the same with the exception that there is a rate and an area shown for an

(Testimony of Duncan H. Knudsen.)

office at 230 Grand Avenue, which was the doctor's business office, and that area times the rate is extended into a premium of $6.25.

Q. Other than that addition it is the same as the previous policy? A. It is the same.

Q. At the expiration or some time about the expiration of this policy was it gain renewed?

A. Yes, it was again renewed for a further term of one year.

Q. Do you have in your records information with respect to the policy that was issued following the one we have just [85] considered for the term of——

A. Yes, I do have a copy of that (handing document to counsel). That is '53 to '54.

Q. The document you have just handed me is your office record with respect to the renewal of the policy? A. That's right.

Q. That expired in 1953, January, and may I ask you, showing you Defendant's Exhibit A, if that is the policy that was issued upon this record.

A. This would be the original contract, correct.

Q. Can you tell us with respect to that policy, the policy for the term January 15, 1953 to January 15, 1954, No. LGP 10122 in what respects that policy differs if any, from the policy which it renewed?

A. It differs not at all except for, I believe, a change in limits from $100,000 to 300,000.

Q. Were any additional properties added to it?

(Testimony of Duncan H. Knudsen.)

A. I will have to refer to the schedule.

Q. This being the daily on the preceding policy (handing papers to the witness.)

A. There is some additional—two additional plots of land near Willows which appears in this one and must have been acquired during the previous year.

Q. And where the premium charges changed in any respects?

A. No, sir, they were still rated on a flat charge basis as [86] had been the case in the previous files.

Q. Did the increase in the policy limits from 100-100 to 300-300, did that result in any increase of premiums?

A. That increased the flat charge from 31, or whatever it was before, to $40.

Q. And does the total premium for all of the insurance appear on that policy?

A. $654.07.

Q. I show you Plaintiff's Exhibit No. 2, which is identified as an extension schedule, and I will ask you to look at that and tell me what that calculation on there with respect to charges and premiums means—the notations on there, what they mean.

A. Well, there are——

Mr. Taylor: Excuse me, Mr. Knudsen. Your Honor, I understand that our objection will go to this, too, because of the fact that it speaks for itself.

Mr. Bacon: This is the company's agent, Your Honor, and he has negotiated this insurance, so we

(Testimony of Duncan H. Knudsen.)

will know and can only know from his mouth from what they were doing in fixing these rates, and what they were providing.

The Court: I will allow it as I did the others subject to a motion to strike and over your objection. I call your attention to the fact that I think your legal objection is good. However, I am giving you a record on it. [87]

The Witness: Proceed?

Mr. Bacon: Yes.

A. There are again a dwelling at 46 Hardwick Ave. rated at a flat charge on the comprehensive personal basis including public liability and property damage. This is true also of the property at Hamburg; one at 40 Hardwick Ave.; the farm premises at Alamo, and the acreage at the Willows locations. Again this was negotiated on a flat charge basis that the other four properties are and at a charge of $40. There is a fifth location which is writen on a liability only basis at 230 Grand Avenue, indicating a liability rate of .896 times an area of 125 square feet, extended to a minumum liability premium of $8.

Q. And that $8 item that you have just referred to, what is that?

A. That is what we call a bodily injury or public liability premium.

Q. But did you refer to it as a minimum premium? A. That is correct.

Q. And the rate is found where in there?

(Testimony of Duncan H. Knudsen.)

A. The rate—there is a column indicated for rates and one for premiums. The rate is in the column for rates at .896 per hundred square feet.

Q. And that appears under "bodily injury"?

A. That is correct. [88]

Q. Was any request made or any insurance sought for property damage on that property?

A. No, there was not. It is pretty difficult to imagine a need for property damage.

Mr. Taylor: Just a minute, Your Honor. I ask that anything further after the words "it was not" be stricken.

Q. (By Mr. Bacon): And why was no request made for property damage coverage on the doctor's office? A. Because there was——

Mr. Taylor: To which we object, Your Honor, as not being within the purview of this suit.

The Court: The fact is there is not.

Mr. Bacon: I wanted to show why, Your Honor, so that we would understand why we were seeking property damage coverage in one instance and not in another, and that was in the negotiations between the agent of the company and the insured.

The Court: Is that in the policy?

Mr. Bacon: This is not a part of the policy, but these are the rates that the company fixed for this insurance.

The Court: Yes.

Mr. Bacon: You see, the insured doesn't see this

(Testimony of Duncan H. Knudsen.)
so we have to go behind to get from the company's representative what——

The Court: At this time I will allow it subject to a [89] motion to strike.

Q. (By Mr. Bacon): There is no provision there for a property damage rate on the doctor's office; is that right? A. There is not.

Q. And the question about which we were having our discussion was, did you request any property damage for that office, and if not, why not?

A. We did not, because again this was a small office, 125 square feet in a building; there was no need for property damage.

Q. When you find a reference in this column headed "Rates" to a flat charge under both columns B.I. and D.P., what does that mean, Mr. Knudsen?

A. That contemplates a flat charge premium embracing public liability and property damage which I had signed originally as comprehensive personal liability insurance.

Mr. Taylor: Your Honor, we ask that that go out as being not responsive and also the opinion and conclusion of the witness. The policy in that regard speaks for itself and is the question that Your Honor is called upon to decide. I think this conclusion of the witness would be invading Your Honor's province. We object to it and ask that it be stricken, and we move at this time that it be stricken.

Mr. Bacon: The policy itself does not contain these premium breakdowns, Your Honor. [90]

(Testimony of Duncan H. Knudsen.)

The Court: We can't read anything into the contract.

Mr. Bacon: No, but we can find out what was being charged for this policy.

The Court: That being the purpose, I will allow it.

Q. (By Mr. Bacon): And the items that appear on that extension schedule having after them, in the column "Rates", "B.I. and D.P." the words "Flat charge", to what does that refer to? To what coverage does it refer—to the basic policy or to some endorsement?

A. It refers to the endorsement which is comprehensive personal liability endorsement.

Q. And that endorsement has both coverages in it, P.D. and bodily injury, does it not?

A. That is right.

Q. And that flat charge that appears in there has reference to the premium for both or for the entire coverage; is that correct?

A. That's right.

Q. You will note down there at one point after the property identified as duck club rated as clubs N.O.C., and identifying certain acreages here, opposite that description the words "flat charge" in the rates column. A. Yes.

Q. In the other column to the right of that, what are those notations or figures? [91]

A. Those are the premiums charged which are of course the flat charge, this premium—the premium stated in this column.

(Testimony of Duncan H. Knudsen.)

Q. And when in that column you find there after the properties I have just mentioned the figure $40—— A. Right.

Q. ——is that the flat charge for these properties? A. That's right.

Q. Under that endorsement?

A. That's right.

Q. And underneath the figures $40 you find in brackets the word "Deposit"——

A. That is correct.

Q. What is the significance, if any, of that?

A. I am at a loss to explain the word "Deposit" because it is stated as being a flat charge.

Q. If a flat charge is made is there any change of the premium subsequently?

A. No, because the flat charge implies what it says: that it is a final charge.

Q. I want to call your attention to a rate manual here and direct your attention to a portion which has been discussed, code No. 113.

The Court: It hasn't been discussed, has it?

Mr. Bacon: Yes, it has, Your Honor. [92]

The Court: 13?

Mr. Bacon: 113. 113 is the code opposite the duck club classification.

The Court: Oh, I see; I follow it now.

Q. (By Mr. Bacon): Referring to that manual, what do you find there with respect to premiums under that, or rates? Either one—premiums or rates under that code number.

A. Code 113 has a rate for the area of buildings,

(Testimony of Duncan H. Knudsen.)

and then there are a number of additional charges with separate code numbers,—camps, canoes or rowboats, a rate per each; docks, floats, golfmobiles; grounds in excess of five acres, a rate per acre; gymnasiums, beach—these are all separate codes in addition to and part of 113—outboard motors, private residences, saddle animals, ski lifts, stadiums, swimming pools, toboggan slides.

Q. If you have given the acreages to be covered, is there a rate fixed for that?

A. Yes, there is.

Q. And what is that rate, please?

A. Excuse me and I will see if I can find it. In excess of five acres is 13 cents each acre—that is liability only; property damage .025 each acre.

Q. And what is the rate for—I think you mentioned the item private residences.

A. Excuse my delay; I have got the wrong number here on this. [93]

Q. I think it is under 770 for your assistance.

A. That's right; $3.50 each private residence bodily injury; $1 property damage each residence.

Q. If the manual is used to determine a premium rate to be charged for the coverage provided in that particular classification, what is the practice in fixing it?

A. Well, you would indicate the number of acres and the number of residences or number of whatever these other items I read.

Q. And on the extension schedule the number of acres do appear; isn't that correct?

(Testimony of Duncan H. Knudsen.)

A. That is right.

Q. And could you give us a quick calculation of what the premium for coverage would be if it were not a flat charge for those properties as listed on this extension schedule in connection with the policy for the period?

A. With those limits, I would roughly estimate somewheres around one hundred dollars; possibly in excess.

Q. And if the manual is not followed and some other rate is adopted—you refer to that, do you, as a negotiated rate?

A. Yes, sir; that is what I said.

Q. And is that what you mean by the rate which appears in connection with the calculation of the premium for this policy?

A. That's why it is termed a flat charge and is set at a [94] flat rate.

Q. And that would not be subject to change?

A. That is correct.

Q. The information that appears on this extension schedule was furnished to the company each time this policy was written; is that correct?

A. That's right.

Q. With any changes in the properties noted?

A. That's right.

Q. Now I will ask you this question, then, Mr. Knudsen; on this record of this policy, this extension schedule, did Dr. Ivey pay a premium for property damage coverage as well as bodily injury

(Testimony of Duncan H. Knudsen.)

coverage under the individual endorsement on the properties in Colusa County?

Mr. Taylor: To which we object, Your Honor; that is exactly the question to be decided by Your Honor. That would be the opinion and conclusion of this witness.

Mr. Bacon: I again remind the Court that this is the company's agent, not a broker. This is the company's agent and he is in a position to say what premiums were negotiated with respect to this policy and what coverage was sought and obtained; and I think when we ask him if Dr. Ivey paid a premium for that coverage, we are entitled to the answer from the company's mouthpiece.

Mr. Taylor: Your Honor, the schedules and the exhibits [95] are in writing, and they speak for themselves.

Mr. Bacon: No, they do not; that is the point.

The Court: In the interests of time I will allow it in subject to the same motion so that you have not lost any of your legal rights if your position is correct. All right.

Mr. Bacon: Would you please answer the question? Shall I reframe it or will you read it to him?

(Question read by the reporter.)

A. Yes, that was the premium to which I referred earlier in testimony as being negotiated.

Q. And did you tell that to Dr. Ivey?

A. Yes, sir.

Mr. Bacon: That is all.

The Court: Take the witness.

(Testimony of Duncan H. Knudsen.)

Cross Examination

Q. (By Mr. Taylor): May I ask whether or not Dr. Ivey got in touch with you at any time with reference to the Colusa loss?

A. Yes, some time in February of 1953 or '4; I have forgotten the year, Mr. Taylor.

Q. He got in touch with you for the first time?

A. That's right.

Q. And told you that a suit had been filed against him? A. That's correct.

Q. And that he had been served with a summons and complaint? [96] A. Correct.

Q. And did you tell him at that time that he had no property damage coverage on the Colusa property?

A. No; I said that I would look at the file and call him back within the hour. I didn't have the file in front of me, but took all the information that he had at that time to give me.

Q. Did you ever tell him that he did not have property damage coverage—— A. No.

Q. ——which would take care of this claim?

A. No, I did not.

Q. Now, Mr. Knudsen, you have had a company experience I see here for some nine and a half years. A. That is correct.

Q. And as a company employee for nine and a half years, you were entirely familiar with the use of the rating manual. A. That's right.

Q. And the various classifications that were contained therein, and you were familiar with the

(Testimony of Duncan H. Knudsen.)

policies available to the public and their coverages, were you not? A. That is correct.

Q. Now can we agree on this basic situation, Mr. Knudsen—excuse me just a moment. Strike that.

Can we agree on the basic principle that in [97] the Individual as Named Insured endorsement, that that endorsement does not apply to business activities of an insured?

A. Yes, there is a definition somewheres in here referring to that.

Q. As a matter of fact, the basic policy it says here does not apply to the business pursuits of the insured except in connection with the conduct of the business—that is the basic comprehensive liability policy.

A. That's right, but of course that is not this——

Q. I appreciate that, but the basic policy does cover the business activities of the insured?

A. That's right.

Q. And the Individual as Named Insured endorsement comes along and changes the basic policy so that the Individual as Named Insured endorsement applies to the personal activities of the named insured; isn't that right? A. That is correct.

Q. And the Individual as Named Insured endorsement does not apply to the business activities of an insured; isn't that correct?

A. The endorsement as such; however, those can be admitted.

Q. The endorsement as such, then, we agree ap-

(Testimony of Duncan H. Knudsen.)

plies to the non-business activities of the insured?

A. That is right.

Q. Is that right? All right. [98]

Mr. Bacon: Just a minute; he hasn't finished.

Mr. Taylor: Oh, excuse me.

A. All of the properties insured under this policy were business properties.

Q. Pardon?

A. All of the properties insured under this policy were business properties from that standpoint.

Q. And being insured as business properties they came under the basic policy?

A. No, under the personal liability endorsement.

Q. Well, I thought we had just agreed that the personal liability endorsement by its very terms applies only to the non-business pursuits.

A. Yes, Mr. Taylor, but there are two ways in which to approach the insurance on these properties. One is on a straight liability basis under the basic policy, and the second way is under the personal liability endorsement, as was the case here.

Q. Yes; but the personal liability endorsement applies to non-business pursuits; isn't that right?

A. That is correct.

Q. All right.

A. Except for the fact that the classifications are available for them under the personal liability coverage.

Q. Yes. And the classification which is avail-

(Testimony of Duncan H. Knudsen.)

able under [99] the personal liability coverage is represented by code numbers in the 700 series?

A. Yes, but this does not appear on the policy.

Q. This extension schedule is the work sheet of the company and is forwarded to the agent.

A. Correct.

Q. And the agent sees it just as soon as the policy is issued? A. That's right.

Q. And the agent has the opportunity of looking down the code numbers and ascertaining the classification by code under which the premiums are computed; isn't that right?

A. That is right. However, as I have stated previously, this is in an assigned class.

The Court: I didn't get that.

The Witness: I have stated previously, your Honor, that these locations—in other words, in distinguishing the codes, that this real property was assigned on a flat charge basis rather than its normal liability rating classification.

Mr. Taylor: Your Honor, that was not responsive to the question and I ask that it go out.

Mr. Bacon: I think it is entirely responsive.

Mr. Taylor: I merely asked this gentleman if when he got the policy he couldn't ascertain the column called "Codes" and indicate the classification under which the policy or the [100] premium was computed on a classification basis—just a minute—and your answer was, "Yes, it appears on the policy and you can see it."; is that right?

A. It appears on the policy is correct, yes.

(Testimony of Duncan H. Knudsen.)

Q. All right. When the classification and the number for the classification is in the 700 series, that is a classification which comes under the Individual as Named Insured group or classification; isn't that right, sir?

A. Yes, but that is not inclusive as to all charges.

Mr. Taylor: Just a minute; I ask that that last part go out. Your answer is yes, that it does come within——

The Court: "But it is not inclusive" may go out; the "Yes" may remain. If he wants to explain his answer, he may.

Mr. Bacon: Yes, he can explain his answer. Will you explain it, please, Mr. Knudsen?

A. Yes, there are certain codes in the 700 bracket as Mr. Taylor stated which are personal liability codes. In this particular instance there was an assignment made on a flat charge basis, which is the theory of the 700 code, for this other property. If it were not, then there would have been a substantially different premium made which would be made for a commercial club or hotel.

Mr. Taylor: I ask that that go out, your Honor, as not responsive to the fact that the 700 series applies to the Individual as Named Insured endorsement. [101]

The Witness: That is correct.

Q. (By Mr. Taylor): And under the 700 series which come under the Individual as Named Insured

(Testimony of Duncan H. Knudsen.)

endorsement, it has under the estimated premium certain figures, does it not? A. Right.

Q. And under the property damage it says, "I-n-c-l." A. Right.

Q. And that means "Included." A. Right.

Q. Is that right? A. Yes.

Q. So that on the extension schedule itself, by an agent such as yourself looking at it, you can tell from the 700 classification, from whatever it says here under "Rates," whatever it says under "Estimated Premium" that there is bodily injury and property damage included under the 700 series; isn't that correct?

A. Discussing this paper now at this point?

Q. That's right.

A. Down to that point I agree.

Mr. Bacon: What point is that, please?

Mr. Taylor: The point is the break between the 700 series and what appears below, which is the duck club and the office property.

Mr. Bacon: That is on which exhibit?

Mr. Taylor: That is on the extension schedule—[102] apparently I have picked up a carbon copy; I guess this is yours.

The Witness: It could be.

Q. And that appears on plaintiff's exhibit 2, which is identical with what we have been talking about; is that correct?

A. Down again to this point.

Q. Down again to the point of break between the 700 code series and a two below. All right. Now

(Testimony of Duncan H. Knudsen.)

we come to the subject of the duck club, and that includes, as I believe it shows here, the duck club and four pieces of property; one for 36.6 acres; one for 1.84 acres; one for 18.6 acres, and one for 133 acres. That is the next item?

A. Right. That is not all the property, however.

Q. That is all the property that is rated under 113, isn't it?

A. Right. And there were also 6 dwellings.

Q. What?

A. There were also six dwellings which has become part of the basis of how this premium flat charge was made.

Q. The six dwellings don't appear, do they?

A. No. They were submitted to the company, however.

Q. All right. In any event, that was rated under 113; is that not right?

A. No, I would disagree; it was not rated because there are [103] no——

Q. Excuse me; and was coded under 113 as appears in the column where it says "Code Number."

A. Indicates that code.

Q. And the next item was the business premises at 230 Grand Avenue, and that was coded under 117. A. That was coded and rated as 117.

Q. All right. Now 117 is found in the portion of the rating manual which applies to owners, landlords and tenants liability; isn't that right?

A. That's right.

(Testimony of Duncan H. Knudsen.)

Q. And 113 and 117 were rated under the basic policy; is that right? A. That is not right.

Q. That is not right?

A. 117, being the Grand Avenue location, yes, was rated at the O.L.&T. Manual and its rate and they are shown. If the assignment of the other to code 113 was not rated at the rates for Code 113 nor rated from that manual because a flat charge was negotiated for this particular group of properties. There are no rates shown nor are there any extensions.

Q. And the flat charge shows $40.00——

A. Yes.

Q. And the B.I. column; is that right?

A. Correct. [104]

Q. And there is no I-n-c-l in the P.D. column?

A. No.

Q. Isn't that right? A. That is right.

Mr. Bacon: Have you an explanation of that, Mr. Knudsen? You started——

A. Yes, all of the——

Mr. Taylor: Your Honor, that is just something that goes contrary to the face of the extension schedule. It is obvious and he has admitted that it does not appear under the P.D. column.

The Witness: I am going to refer to the balance of this document, your Honor.

Mr. Bacon: This is the company's agent who negotiated this insurance and told the insured what he was getting.

Mr. Taylor: And the company's agent, your

(Testimony of Duncan H. Knudsen.)

Honor, has no right to go beyond the scope of his agency.

The Witness: Also in this same document, Mr. Taylor——

The Court: Excuse me. In my present state of mind I am limited to the policies themselves and what they contain, and beyond that we are wasting our time. Proceed.

Mr. Taylor: Do you have the policy, counsel, plaintiff's A?

Mr. Bacon: No.

The Court: Have you got Plaintiff's A? [105]

A. No, I do not.

Mr. Bacon: Oh, yes, here it is.

Q. (By Mr. Taylor): I show you Defendant's Exhibit A which is in evidence, and which I believe you said was the original policy issued to Dr. Ivey in January of 1953. A. That is correct.

Q. Now, on the front page—I assume that you saw that policy; it came to you, and then you delivered it to Dr. Ivey? A. That is right.

Q. On the front page it shows Public Liability Injury, $300,000.00 limit. A. Right.

Q. And it shows Automobile Property Damage, $5,000.00. A. Correct.

Q. And it shows under Bodily Injury Liability other than automobile "No coverage?" A. No.

Q. Or "Not covered?"

A. No; bodily injury——

Q. Excuse me; property damage liability except automobile, "Not covered."

(Testimony of Duncan H. Knudsen.)

A. That is right. That is a second limit in the policy.

Mr. Bacon: What was that last statement?

A. There is a second limit.

Mr. Taylor: He says there is a second limit in the [106] policy which you can inquire about.

Q. Now originally you believed that this duck club was a non-business enterprise, did you, Mr. Knudsen?

A. No; we knew that there were shooters on this property and it was so divulged when we submitted the risk.

Q. But when this law suit started or this claim came up you took the position, did you not, that the duck club was a non-business enterprise?

A. Yes; I still feel that way, honestly.

Q. You feel that the duck club is a personal pursuit of the doctor's; is that right?

A. Yes, I do.

Q. And you feel that, being a personal pursuit of the doctor's, it comes under the Individual as Named Insured endorsement which covers personal pursuits? A. Yes.

Q. Is that right?

A. With the exception of these dwellings I mentioned, which are also part of the same property.

Q. With the exception of what?

A. Of the dwellings which I mentioned earlier, which were evidently left out of the schedule; but these were dwellings which were occupied by persons who shoot.

(Testimony of Duncan H. Knudsen.)

Q. There is nothing in the policy or the extension schedules or any of these schedules with reference to any buildings on [107] the duck club property; is there, sir? A. No, there is not.

Q. Do you have the rating? Will you look under Code 113 for duck clubs?

Mr. Bacon: It isn't duck clubs, Mr. Taylor; it doesn't say that. It says something "Clubs not otherwise classified," and it has a lot of additional things there that explains what Mr. Knudsen has been telling you about the negotiated rates, so don't say it is a duck club.

Mr. Taylor: On the extension schedule it is shown as duck club, not otherwise classified, 113.

A. It says "Duck Club" rated as, doesn't it?

Q. Rated as clubs not otherwise classified.

A. That's right.

Q. Do you find there under the ratings a bodily injury rating rate of $25.00 which would be for the minimum rate?

A. No; there is a minimum premium, not a minimum rate.

Q. Excuse me; not being in the insurance business I am not using these correctly. A minimum premium of $25.00 is shown for personal injuries.

A. That is correct.

Q. Is that not right? A. Yes.

Q. And the minimum premium gives how much liability coverage?

A. Five and ten thousand. [108]

Q. All right. If you want to increase that, if

(Testimony of Duncan H. Knudsen.)
you want to increase the limits from five and ten to three hundred thousand, what rate would be charged for that increase?

A. Do you want me to multiply this out?

Q. And what would the premium be? What would the premium be for $300,000.00

Mr. Bacon: You mean the minimum premium provided in there?

Mr. Taylor: I want the premium for $300,000.00 under Code 113.

A. In order to do that, Mr. Taylor, we will have to take the acreage and extend them times the rate plus the increase limits charged.

The Court: So that you may do that, we will take a recess.

(Recess.)

Mr. Taylor: May I have the last question, please, Mr. Reporter?

(The reporter read the last question.)

The Court: We took a recess so he could make a computation. Did you make up the computation?

A. Yes, your Honor. The premium would be $115.95. This is based upon the 113 Code as a charge per acre for acreage in excess of 5 acres. There is 372.2 acres, less the 5 acres, is 365.2, times the rate of 13 cents each acre, increased 160 per cent for the limits developed—Wait a minute; I'm [109] sorry; $47.47, less the $25.00 for the extra minimum premium, plus 60 per cent is another 15, is 40; I'm sorry. The total should be $87.47. That

(Testimony of Duncan H. Knudsen.)

corrects the previous figure I gave you. May I explain this?

Mr. Taylor: You mean explain your computation? A. Yes.

Q. Let me ask you this question and this may bring it out: You said that you negotiated a premium with the representative of the United National. A. That is correct.

Q. And when you negotiate a premium you agree on a certain premium; is that what you mean?

A. Well, I mean in this case that we agreed on a flat charge. That is why I asked if I might explain.

Q. You have agreed on a flat charge even though you have computed here that the $87.47 would have been the premium worked out on an acreage basis.

A. If it were done on what you call an O.L.&T. basis, it would be that figure; but if you look at the schedule again the top says, "Comprehensive personal 300,000/250." That indicates the medical—and it lists all these properties, with these flat charges opposite them. Then when you get to the last one, which is the office, it then indicates a rate times some area and it is a separate B.I. premium. And all of these, as far as I was concerned, and still am of the same [110] opinion—these flat charges were all contemplated under the comprehensive personal, which includes public liability and property damage as indicated by the heading on this schedule.

Q. I will ask you this question again: Under

(Testimony of Duncan H. Knudsen.)

the estimated premium opposite the flat charge for the duck club it does not include the words "I-n-c-l."

A. I think that is immaterial because——

Q. Just a minute, please. It does not include the words "I-n-c-l?" A. It does not.

Q. That stands for "Included?"

A. That's right.

Q. And those do appear in the four items up above—— A. However——

Q. Is that right?

A. Correct. However, the heading is "Comprehensive personal" at the top of the schedule.

Q. That appears in that first item "Comprehensive personal 300,000" and then the word "Line" 250, 46 Gardwick Avenue, Piedmont, California.

A. That's right.

A. All right. Let me ask you if this computation that I am going to make is not true—and I want you to look at the original extension schedule that you had with the original policy—opposite the duck club and the other information, it [111] shows under B.I. column $31.25, is that not correct? A. That is correct. However——

Q. Well, it is correct, isn't it? A. Yes.

Mr. Bacon: The witness is entitled to explain.

Mr. Taylor: This is cross-examination.

Mr. Bacon: Just a minute, please, Mr. Taylor. If the witness has some explanation when he answers your question, I think he is entitled to give it, is he not?

(Testimony of Duncan H. Knudsen.)

The Court: You may bring this out by questions on cross.

Mr. Taylor: It is such a simple question; it either is or isn't there, and now he wants to make a speech.

The Witness: No, Mr. Taylor; all of these items are coded as bodily injury, you find in the company's own coding over here. The fact that it says "Included" or not in here has nothing to do with the coding.

Mr. Taylor: Your Honor, I ask that that go completely out——

The Court: It will go out.

Mr. Taylor: Whether it appears there or whether it is something that has nothing to do is not before us.

Q. Going back to that $31.25 which appears under "Bodily Injury"—do you have that in mind?

A. Yes.

Q. If you will look under Code 113 you will find that the [112] minimum premium for personal injury, bodily injury is $25.00, which gives you limits of five thousand; is that correct?

A. That is correct.

Q. All right. Now using that minimum premium and using it as a flat charge, if you wanted to increase it to one hundred thousand with increased limits, you would add 25 per cent of the minimum to the minimum to arrive at the premium; is that not correct?

(Testimony of Duncan H. Knudsen.)

A. That is correct only as respects the minimum premium, not correct as respects the acreage.

Q. Well, yes, as to the minimum premium on a flat charge basis that would be $25.00 minimum plus 25 per cent. A. Right.

Q. For increased limits.

A. Plus the charge for the acreage, Mr. Taylor. If you are following this manual you have got to rate the acres as specified.

Q. Even on a negotiated basis?

A. No, because we are not talking about the same manual when we are talking about the negotiated rate. This is the O.L.&T. Manual and if you take your minimum plus your acreage, you would develop a premium which is different than this but my reference to negotiation has been several times today that the negotiation was based on the comprehensive personal liability coverage as this schedule is headed, so it [113] has nothing to do with this manual.

Q. That is your testimony, yes, but assuming—Let's put it this way: A negotiated rate, which is a flat charge, under Code 113, the minimum being $25.00 for $5,000.00 coverage, if you wanted to have a hundred thousand dollars coverage you would increase the minimum by 25 per cent, would you not?

A. Yes, but I can't assume anything. I have given you my testimony.

Q. All right. That would make 25 per cent over $25.00, which would make it 6.25, which would make it $31.25; is that computation correct or not?

(Testimony of Duncan H. Knudsen.)

A. $25.00 plus 25 per cent is $31.25.

Q. And that would be for limits of $100,000.00; is that right?

A. Yes. But what you are stating, however, is that that was the minimum premium for this O.L.&T. classification. That I accept.

Q. That you don't agree with?

A. No. I accept it; it is the minimum premium on this classification if there are no other charges involved.

Q. If you don't use it on an acreage basis, that would be the way to compute it?

A. No; you are required to include the acreage basis, Mr. Taylor.

Q. Let me ask you this: If you wanted to increase it to [114] $300,000.00, you would take the minimum plus 60 per cent, would you not?

A. I assume that 60 per cent was true at the 1951 date; I can't say.

Q. Let's take the '53 or '54 date.

A. Then 60 per cent was correct.

Q. So 60 per cent of $25.00 is $15.00, and that added to $25.00 leaves $40.00; is that not correct?

A. That multiplication is right, yes.

Q. Let me ask you this one other question—I might have gone over this before, I don't know—Code 117 which is opposite the doctor's office is found——

A. Which file are you looking at, Mr. Taylor?

Q. The extension schedule.

A. Which one? This one doesn't have it.

(Testimony of Duncan H. Knudsen.)

Q. The 1954—January, 1953 extension schedule.

A. '53 to '54?

Q. Yes. A. O.K.

Q. Code 117 is found in the same part of the rate manual or close to 113, is that not right?

A. Yes, but I go back to the fact that it was negotiated.

Q. They come within the same portion close together in the rating manual; is that so?

A. Yes, but a negotiated rate, Mr. Taylor, could be assigned [115] to any number.

Q. Was the 220 Grand Avenue negotiated?

A. No, that is a standard rate for an office.

Q. That was not negotiated and that was under an O.L.&T. classification?

A. It is further not negotiated because there is shown a proper O.L.&T. Manual rate per 100 square feet and it is extended; so obviously it is not negotiated.

Q. Well, you will admit that the doctor's office did not have any property damage coverage?

A. I have admitted that.

Q. And that nothing appears in the property damage portion of the extension schedule?

A. That's right, because there is a column for the rates which are set out on the calculated rates basis, which definitions we applied earlier, but the balance of all the properties appear only under one——

Mr. Taylor: I ask that that go out, your Honor, as entirely immaterial, and it is not responsive to

(Testimony of Duncan H. Knudsen.)

the question. The question is whether or not anything appeared under property damage in the doctor's office column, and he says "no."

The Witness: No.

Q. Now, did I understand you to say that you told Dr. Ivey that he had property damage coverage on the duck club?

A. I did, because it was negotiated—— [116]

Q. Wait a minute. Did I understand you to say that you told him that he had it; is that right?

A. That is right.

Q. May I ask when you told him that?

A. Well, we prepared for Dr. Ivey surveys which were usually delivered once a year describing the coverages that he had on this and other policies.

Q. In which you told him that he had property damage coverage on the duck club?

A. I told him in this manner: That it was included along with these other classifications in this comprehensive personal liability endorsement.

Q. Let me ask you this: Did you tell him that he had property damage coverage on the duck club?

A. The endorsement——

Q. Yes or no?

A. Yes, because the endorsement includes property damage.

Mr. Taylor: We ask that that go out, your Honor.

The Court: It may go out.

Mr. Taylor: Now——

(Testimony of Duncan H. Knudsen.)

The Court: Just a moment. You told him that. You told him what?

A. I told him that the properties we were discussing, including this duck club property, your Honor, were rated under the comprehensive personal liability coverage, and that includes [117] property damage.

Q. When did you tell him that?

A. In the surveys and also in conversations.

Q. When?

A. Both in '51, '52, '53, '54 and to date, because we have delivered a survey each year.

Q. (By Mr. Taylor): Do you have copies of the surveys? A. Yes.

Q. May I see the '51 survey?

A. I don't know whether I can find that one. I don't know what year I have here with me.

The Court: Does counsel have '51?

The Witness: Here is one for '53.

Mr. Bacon: I have one here for '53.

The Court: Was '51 the first one?

Mr. Taylor: Yes, your Honor.

The Witness: I don't have it with me.

Mr. Taylor: Do you have '52?

A. '53.

Mr. Bacon: Do you want to use '53, Mr. Taylor?

Mr. Taylor: Yes. May I?

Q. Do you have your copy of '53?

A. Yes, I do.

Q. Are these the same?

A. That refers to 10122? Yes. This is what we

(Testimony of Duncan H. Knudsen.)

call a [118] summary, Mr. Taylor, and it is accompanied with some personal discussions with Dr. Ivey on delivering it.

Q. Can you point out to me where it says that he has property damage coverage on his duck club properties?

A. To this extent: That the limits of this contract are shown.

Q. Is there any place where it says, "Dr. Ivey, you have property damage coverage on the duck club?"

A. No, I didn't say that this survey did; I said I told him that. This is a summary indicating the limits, and then I explained what these coverages are.

Q. I understood your testimony to be that you told him by way of a survey or summary that he had property damage coverage on the duck club property.

A. No; I didn't say it was in that summary.

Q. You told him that in addition to the summary?

A. That's right. In other words, this is a brief summary which was accompanied naturally with an oral explanation.

Q. What does the summary say?

A. The summary says—Do you want me to read it?

Mr. Taylor: I think the summary——

The Court: I would like to hear the summary. Read it.

(Testimony of Duncan H. Knudsen.)

A. It refers to this particular policy, your Honor, provides the number, the name of the company, the term; the limits are stated 300-300 bodily injury, $5,000.00 property damage, [119] $300,000. personal liability; the premium is stated, $514.25 "This contract extends blanket coverage for all personal acts or activities, including automatic coverage for real property or automobiles."

"Premiums are specifically set up for real properties as follows": Those that we have discussed before are listed—Gardwick 2 locations, Hamberg, Alamo, Willow.

"Premiums are charged for the following licensed automobiles: Chrysler, Willys Jeep, Chevrolet truck and 1952 Cadillac."

The Court: What is the Willows properties? Is that the duck club?

Mr. Taylor: Yes, Willows, California.

A. Speaking of it generally. And the title to this section is "Comprehensive Public Liability and Property Damage."

Q. (By Mr. Taylor): Insofar as it states there, the only property damage mentioned is the $5,000.00 automobile property damage—yes or no?

A. No.—Yes.

Q. In addition it has $300,000.00 personal liability? A. Right.

Q. And that is both property damage and personal injury? A. That is correct.

Q. And that is for non-business pursuits, isn't it, Mr. [120] Knudsen? You can answer that "yes"

(Testimony of Duncan H. Knudsen.)

or "no." It does cover non-business pursuits?

A. Cover non-business pursuits?

Q. The personal liability covers non-business pursuits. A. No.

Q. Well, I thought we agreed that it did.

A. No.

Q. ——under the policy here.

A. Do you want me to show you the manual, Mr. Taylor?

Q. I am looking for the policy, if I can find it. Here it is. A. The manual——

Q. Just a minute. The endorsement under the policy which covers the Individual as Named Insured applies only to non-business pursuits; is that right?

A. Yes. In that event nothing is covered under this policy.

Mr. Taylor: I ask that the last go out as being non-responsive.

The Court: It may go out.

Q. (By Mr. Taylor): This contract extends blanket coverage for the personal acts or activities; that is what you told me?

A. That is what it says.

Q. Including automatic coverage for real property; is that what you told me?

A. Yes.

Q. And part of the real properties was 230 Grand Avenue [121] in Oakland?

A. That is correct.

Q. Now, do you mean to say that he was pro-

(Testimony of Duncan H. Knudsen.)

vided with property damage coverage for 230 Grand Avenue? A. That isn't a real property.

Q. Just a minute, please. Do you mean to say that he was provided with property damage for 230 Grand Avenue?

A. I said previously he was not. That is not a real property.

Q. The office?

Mr. Bacon: It is a rented office.

The Witness: The balance of the properties are real properties.

Mr. Taylor: Pardon?

The Witness: The balance of the locations are real properties.

Q. The office is real property. Maybe he doesn't own it, but it is real property, I think you will agree. A. I don't know.

Q. You are not contending that there is any property damage at the office, are you?

A. No, I am not.

Q. And you haven't set forth in your summary here any distinction between the Grand Avenue property and the Willows property and any of the others, have you?

A. No, nor the occupancy is not indicated; that's right. [122]

Mr. Taylor: I wonder if this can be marked so it could be left here, your Honor?

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit No. 4.

Mr. Taylor: I am not offering it.

(Testimony of Duncan H. Knudsen.)

The Clerk: Marked for identification.

Mr. Bacon: Put it in evidence if you want.

Mr. Taylor: I don't care to.

Mr. Bacon: Let us put it in then, your Honor.

The Court: Very well; it may go in evidence.

Mr. Taylor: I suppose it will be limited—it is a complete summary, but it is limited just to——

The Court: No, the whole document will have to go in. You have been examining him on it.

The Clerk: Defendant's Exhibit D admitted and filed in evidence.

(The insurance summary referred to was marked Defendant's Exhibit D in evidence.)

Mr. Taylor: I have no further questions.

Redirect Examination

Q. (By Mr. Bacon): Mr. Knudsen, did Dr. Ivey ask you for property damage and public liability coverage when he went to you for his insurance on all of his properties?

Mr. Taylor: To which we object, your Honor, because it would be self-serving and it is not within the issues here. [123] The policy that was issued speaks for itself, no matter what was asked for.

Mr. Bacon: Oh, I think that is not the limitation, if the Court please.

If that is answered, it will lead to another question as to what was provided, what did he obtain for it.

The Court: Ask him the direct question.

Q. (By Mr. Bacon): Mr. Knudsen, after your

(Testimony of Duncan H. Knudsen.)

discussion with Dr. Ivey and obtaining all the information about his properties as you have told us, what insurance coverage did you provide him? What did he get under this policy we are concerned here with?

Mr. Taylor: Your Honor, the policy speaks for itself as to what he got. We will object to any attempt to enlarge upon it, as to what he got.

Mr. Bacon: This man is an agent of the company and he knew what was sought and he knew what was given. Now, if by any chance it can be said that this policy doesn't cover it, we are certainly entitled to have the benefit of what was sought and what was given.

The Court: You are limited to the policy itself.

Mr. Bacon: I don't understand that to be the law, your Honor.

The Court: Well, if it isn't the law, you persuade me otherwise. I will give you full opportunity .[124]

Mr. Bacon: We will have some authorities on that, your Honor.

The Court: I will allow it subject to a motion to strike your objections.

Mr. Bacon: Do you understand the question?

The Witness: The question again, please, Mr. Bacon.

Q. I asked you if after you had obtained all the information from Dr. Ivey about his properties and his requests for insurance, did you provide him with the coverage he asked?

A. Yes, which was public liability and property

(Testimony of Duncan H. Knudsen.)

damage with the exception of this office location which I mentioned previously.

Q. That was what the doctor wanted and that was what you gave him?

A. That is correct.

Q. And this matter of premium calculations was a matter that went on between you and the underwriter in the Oakland office of the plaintiff company.

A. That is correct; the premium wasn't discussed with the doctor.

Q. And I will ask you again about the heading on the extension schedule, which is Plaintiff's Exhibit 2. If this heading, the beginning of it there, where it says "Comprehensive Personal 300,000/250," does that apply to just one or to all of the property listed on there? [125]

Mr. Taylor: To which we object, your Honor. The extension schedule speaks for itself.

Mr. Bacon: It doesn't speak for itself, and it is subject to this witness' explanation of it if it doesn't speak for itself.

Mr. Taylor: We will object to it on that ground.

Mr. Bacon: This man is the man——

The Court: Here is the original document.

Mr. Bacon: He is the voice of the company, your Honor.

The Court: I understand that. I will sustain the objection so that we will get somewhere in this case.

Mr. Bacon: That is all.

Mr. Taylor: No further questions, your Honor.

(Testimony of Duncan H. Knudsen.)

The Court: Step down.

Mr. Taylor: May I make a motion to strike at this time, your Honor, or shall I reserve it?

The Court: No, not until the matter is submitted.

Mr. Bacon: May we have Mrs. Marshall. Bring all the witnesses in, because we will just put Mrs. Marshall on and we won't use the others.

MRS. RITA MARSHALL

called as a witness by the defendant, being first duly sworn, testified as follows:

Q. (By The Court): What is your full name?

A. Rita Marshall. [126]

The Court: And where do you live?

A. 4807 Ygnacia Avenue, Oakland.

Q. And your business or occupation?

A. Housewife at present.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Bacon): Mrs. Marshall, prior to 1951 did you have an occupation?

A. I was. I was in my husband's office.

Q. And were you an insurance broker at that time or solicitor? A. Yes, I was.

Q. And are you acquainted with Dr. Everett Ivey? A. I am.

Q. And when did you first meet Dr. Ivey so far as any insurance is concerned?

A. Well, it would be around that time possibly

(Testimony of Mrs. Rita Marshall.)

that we wrote insurance for him, but I had known him prior to that time.

Q. And your husband's and your office handled his insurance as brokers at that time?

A. I was an insurance broker.

Q. And about that time did you retire from the insurance business?

A. I believe—I am just guessing now—it was about June of '52 that I retired from that business. [127]

Q. And some time in 1951 did you refer Dr. Ivey to Mr. Duncan H. Knudsen with respect to insurance matters?

A. When I retired I referred Dr. Ivey to Mr. Knudsen.

Q. And at that time did you tell Mr. Knudsen what you had advised Dr. Ivey to do with respect to his insurance?

Mr. Taylor: Just a moment, please.

The Court: The parties are not bound by any conversation of that kind.

Mr. Taylor: It is clearly hearsay.

The Court: They are not bound by it unless they were present.

Mr. Bacon: Yes, but Mr. Knudsen was an agent of the company, and this lady took the insured to him.

The Court: All right.

Mr. Bacon: And told him what they wanted.

Mr. Taylor: We will object to it, your Honor.

The Court: So that we will have a record on

(Testimony of Mrs. Rita Marshall.)

both sides with considerable latitude, I will allow it, subject to the same motion.

Mr. Bacon: Yes, your Honor.

Q. Did you refer Dr. Ivey to Mr. Knudsen?

A. I did.

Q. Did you personally tell Mr. Knudsen what——

The Court: What she personally told him may go out.

Q. (By Mr. Bacon): Did you, as Dr. Ivey's broker, tell Mr. [128] Knudsen what insurance the doctor desired? A. Yes.

Mr. Taylor: Just a minute, your Honor. I don't see any relevancy at all to this. I think we are just going away beyond the realm of proper examination; it is clearly hearsay.

The Court: I will sustain the objection.

Mr. Bacon: I would just like to offer to prove that this witness as his——

The Court: Protect your record. Proceed. An offer of proof will not assist us. You may get a record so that you will——

Mr. Bacon: Well, I would be very glad to say what I offer to prove, your Honor, but I understood you to say that I would be precluded from doing that.

The Court: No, no.

Mr. Bacon: Well, we offer to prove then by this witness that Mrs. Marshall who had acted as the doctor's broker, when she turned the matter over to Mr. Knudsen——

(Testimony of Mrs. Rita Marshall.)

The Court: Yes.

Mr. Bacon: ——as an agent of the plaintiff company here——

The Court: Yes.

Mr. Bacon: She told Mr. Knudsen with Dr. Ivey what insurance they wanted. Now he is a representative of these companies?

The Court: What insurance did they want? What was said? [129]

A. Well, at the time I insured the doctor, I urged him to—I knew that he had a number of small enterprises, and I urged him to take out a general liability policy to cover all of his activities with the exception of malpractice. He did that, and he paid a large premium for it. Then at the time I retired I explained the very same situation to Mr. Knudsen, and he said that he would carry on and see that the doctor was fully covered, because I told him that the doctor expected that coverage.

The Court: Is that all?

Mr. Bacon: That is all, your Honor.

The Court: Take the witness.

Cross Examination

Q. (By Mr. Taylor): Do you have with you any of the policies or copies of the policies that you wrote for Dr. Ivey? A. No.

Q. When did you first write a policy for Dr. Ivey, do you remember?

(Testimony of Mrs. Rita Marshall.)

A. Well, the very first one I would say in '50 or possibly '49; it might have been that late.

Q. And you just wrote the policy for two years?

A. Well, that I couldn't say. They were for a year at a time, I believe.

Q. And you recommended a general liability policy?

A. I did, and the doctor was under the impression that he [130] was fully covered.

Mr. Taylor: Just a minute, your Honor.

The Court: The doctor's impression may go out.

Mr. Taylor: My question was that you did write a general liability policy?

A. I believe that is what you would call it.

Mr. Taylor: I have no further questions.

Mr. Bacon: That is all.

The Court: Step down.

Mr. Bacon: We rest, your Honor.

(Testimony closed.) [131]

[Endorsed]: Filed May 9, 1957.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT
CLOSING ARGUMENT

Monday, December 3, 1956

The Clerk: United National Indemnity Company, et al., versus Everett D. Ivey, et al.

Mr. Taylor: Ready.

Mr. Bacon: Ready, your Honor. In the defendant's answer in this case, your Honor, there was a counterclaim with respect to which no testimony was adduced. I have spoken to Mr. Taylor, and we are going to leave that open for such disposition, or such agreement, as the decision in the case may indicate.

The Court: Well, if the testimony is not here and this case is submitted, I will dispose of the counterclaim.

Mr. Bacon: Well, the counterclaim can abide the result. If there is a judgment in favor of the plaintiff, there would be no occasion for the counterclaim. If there is a judgment for the defendant, then we will make some agreement.

The Court: Is that agreeable?

Mr. Taylor: Yes, your Honor. It is my understanding with Mr. Bacon that if there is a judgment for the plaintiff the counterclaim automatically goes out.

The Court: All right. You are going to argue this case now? What time do you want?

Mr. Taylor: I think we will be satisfied with half an hour for our side.

Mr. Chamberlin: That is satisfactory, your Honor.

The Court: Proceed.

Mr. Taylor: Your Honor, at this time, plaintiff having rested and defendant having rested, this being the time for argument, preliminarily I renew my motion to strike from the testimony of Mr. Knudsen all of those references that have been made

to conversations that he had with Dr. Ivey concerning the coverage that he wanted; the conversation between Mr. Knudsen and the Oakland representatives of the company concerning the coverage; the conversations as to whether or not certain rates included property damage, and calculations which were made with respect to the premium charges; conversations that there was no request for property damage for the doctor's office; as to whether or not Dr. Ivey paid a premium for property damage on the Colusa County property; statements by Mr. Knudsen from the stand, over our objection, as to what insurance coverage was provided for Dr. Ivey; and testimony over our objections as to what Mrs. Marshall had told Mr. Knudsen in reference to what she had advised Dr. Ivey; and other conversations between Mrs. Marshall and Mr. Knudsen.

We moved to strike at the time, and I don't know whether this list I have just made is inclusive or not, but in case there are other matters in the transcript, we ask that they be stricken if there was an attempt on the part of the witness to vary the terms of the written contract.

Our grounds for that is that the insurance policy, which is Defendant's Exhibit A, and the endorsement which is attached thereto, is self-explanatory and speaks for itself.

Now, it is the position of the plaintiff United National Insurance Company, Your Honor, that what we call the basic comprehensive general automobile liability policy, being the policy which is in

evidence as Defendant's Exhibit A, provides on the face of it underneath the wording "5", which I will read to your Honor, it says:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto."

And on the front page the coverage is:

"A, bodily injury liability." It shows $300,000 each person, $300,000 each accident, with no coverage as to products.

Under the bodily injury liability section the premium is shown as $482.27.

This policy also shows, under coverage B, property damage liability—automobile. It shows $5,000 for each accident, and an advance premium of $171.80.

Then insofar as coverage C is concerned, property damage liability, except automobile, it shows not covered in five places on the face of the policy, and where it says "advanced premiums", it says "Nil", which means "None", because the total advance premiums is the total of the two premiums appearing opposite "bodily injury liability" and "property damage liability".

Now, I also would like to call Your Honor's attention to Condition 16 of the policy, which notes "Changes":

"Notice to any agent or knowledge possessed by any agent or by any other person shall not effect

a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy——"

That is on the very last page, Your Honor, on the inner part of the page, Nos. 15, down at the bottom of the page.

The Court: Just a moment. All right, proceed with No. 16.

Mr. Taylor: "Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the president or secretary of the company."

Then under 19, "Declarations.

"By acceptance of this policy the named insured agrees that the statements in the declaration are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

Now, that is the basic general liability policy, comprehensive general automobile liability policy, which does afford—which does afford coverage for the business enterprises of the doctor, for coverage in connection with his business activities, which would include his duck club and would include his office on Grand Avenue for bodily injury only.

Now, along comes an endorsement, Endorsement No. 1, that has been referred to as the "Individual as Named Insured" endorsement. That is also photostated, Your Honor, and a part of the complaint.

In which it states, "the policy"—and that is the basic policy I just read portions of—"the policy does not apply to any business pursuit of the insured except in connection with the conduct of a business of which the named insured is the sole owner."—which is to be interpreted, Your Honor, as meaning that the policy does apply to solely owned business enterprises. And I think we can all agree on that.

Then Roman Numeral II, right following that, "except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows", which is very clear and which is interpreted, Your Honor, as amending the main policy except with reference to the business of which Dr. Ivey is the sole owner.

That amendment does provide property damage coverage. But it is the position of the plaintiff, Your Honor, that that amendment and this endorsement apply only and solely to what we call non-business pursuits and non-business activities.

We have a stipulation from counsel that the duck club is a business pursuit. Therefore, it follows that just as logically and as clearly as can be that the duck club comes under the basic policy and is expressly excused and excepted from the "individual as named insured" endorsement.

Now, the policy and endorsements, Your Honor,

speak for themselves. The survey that has been testified to and the extension schedules, being Plaintiff's Exhibits 1 and 2 in evidence, are not a part of the policy. Mr. Knudsen so testified on page 78, line 10, of the transcript which has been prepared.

These two exhibits, Plaintiff's Exhibits 1 and 2, are not part of the policy. They are turned over to the agent but are not affixed to the general policy and they are not turned over to the insured.

It is our position that there is no ambiguity in the policy, the policy is clear in its terms, the endorsement is clear in its terms, and they are to be construed together, and being construed together they provide the coverage which is shown on the face of the policy and as shown on the endorsement.

These documents speak for themselves. And the agent, Your Honor, has no authority to make any changes in the coverage just on his own.

Now, Mr. Knudsen takes the stand and tries to create the ambiguity. He says that the company is told that Dr. Ivey wanted full coverage. But let's analyze that for a moment, your Honor. Dr. Ivey didn't get full coverage. Dr. Ivey didn't get any malpractice coverage. Dr. Ivey didn't get any products coverage. Dr. Ivey didn't get property damage on his office, which is a business activity. And he didn't get any property damage on the duck club, which is also a business activity.

Mr. Knudsen indicated that he told Dr. Ivey that he had property damage on the duck club. And in answer to one of Your Honor's questions on page

118 of the transcript—I believe it was Your Honor that asked this question:

"Q. When did you tell him that?"

——referring to property damage on the duck club, and the answer was:

"In the surveys and also in the conversations." And it was brought out that these surveys had been made in 1951, 1952 and 1953.

But when we follow that up, your Honor, there is nothing in the survey—there is nothing in the survey, which is Plaintiff's Exhibit 4 for identification, and Defendant's Exhibit D in evidence—there is nothing in that survey which comes right out and says, "Dr. Ivey, you have property damage coverage on your duck club, or on your Willows, California property."

There is nothing that says that, your Honor. It does say, "This contract extends blanket coverage for all personal acts and activities."

And we agree that insofar as a personal act or activity is concerned, Dr. Ivey would have property damage coverage.

In other words, if he hit a golf ball through a plate glass window, being a personal act there would be coverage for the property damage caused by that personal act. But the duck club is not a personal act. It is definitely a business pursuit, and it is a business pursuit in which the doctor is the sole owner. Therefore it doesn't come under the "individual as named insured" endorsement, and there is no coverage.

The summary so indicates that this blanket coverage is for all personal acts and activities. And then

it says, "Including automatic coverage for real properties or automobiles."

Well, "including automatic coverage for real properties and automobiles," doesn't say complete property damage coverage. It just says, "includes automatic coverage for real properties."

And then the real properties which are listed, your Honor, lists two places in Piedmont, one in Hamburg, one in Alamo, one in Willows and one at Grand Avenue. In other words, all the real properties are listed together.

Now, Mr. Knudsen admits that there is no property damage coverage on the office. He has admitted that at page 122 of the transcript, lines 6 to 8:

"Q. Do you mean to say that he was provided with property damage for 230 Grand Avenue?

"A. I said previously he was not. That is not a real property."

And then later on, line 19, page 122:

"Q. You are not contending that there is any property damage at the office, are you?

"A. No, I am not.

"Q. And you haven't set forth in your summary here any distinction between the Grand Avenue property and the Willows property and any of the others, have you?"

He says, "No, nor the occupancy is not indicated; that's right."

In other words, the summary says that you would have automatic coverage for all of these properties, but by their own admission there is no property damage at the Grand Avenue, Oakland, address;

and we contend that that being a business property, the Willows, California property being a business property, there is no property damage coverage at Willows, and this summary does not make any distinction between the two and is not, in effect, telling the doctor that he had property damage coverage.

But let's assume that Mr. Knudsen did tell Dr. Ivey this—just assuming it for the sake of argument, and not admitting it, your Honor. If he did tell Dr. Ivey so many times in the surveys and orally that he did have the coverage, why didn't he realize that there was property damage coverage on the duck club when Dr. Ivey called him up and said, "Mr. Knudsen, I have a suit filed against me."

Why didn't the doctor realize it if this was a subject so constantly repeated to the doctor, that he had property damage on his duck club? Why didn't the doctor realize that he had that coverage?

I think it is very clear, your Honor, that the statements made by the doctor to the investigator in March of 1952—this is on page 72 beginning at line 7 of the transcript:

"Doctor, were you aware there might possibly be insurance coverage regarding your liability for this occurrence?

"A. I wasn't certain at all. As a matter of fact, I inquired a little bit, and my impression was it didn't cover it. Finally I called Mr. Knudsen and he said he didn't think it was covered. And then I talked to my friend, a Mr. Marsh, and later Mr. Knudsen called me back and said that there is a

question. And that is where it stood. And so my knowledge of that was complete ignorance on what I was protected for."

Now, how could he plead complete ignorance if, as the testimony of the defendants tries to portray, Dr. Ivey knew from the surveys, he knew from the conversations that he had property damage coverage on the duck club?

Mr. Knudsen has contradicted Dr. Ivey in several respects, your Honor, in this that I have just pointed out. Dr. Ivey said that Mr. Knudsen says he didn't think he had coverage. Mr. Knudsen takes the stand and says he never told Dr. Ivey he wasn't covered.

He contradicted Dr. Ivey, in effect, when Dr. Ivey's counsel has stipulated that this was a business activity, the duck farm was a business activity, and Mr. Knudsen says on page 107 of the transcript, beginning at line 6, when I asked him:

"But when this lawsuit started or this claim came up, you took the position, did you not, that the duck club was a non-business enterprise?"

And Mr. Knudsen says, "Yes; I still feel that way, honestly."

I said, "You feel that the duck club is a personal pursuit of the doctor's, is that right?"

He said in his answer, "Yes, I do."

There is another contradiction with a stipulated fact which appears in this record. He contradicted himself, as I told you, your Honor, when he said that he had indicated in the summary that he had told Dr. Ivey that he had property damage cover-

age on the duck club. It doesn't appear in the summary in any specific, definite statement.

And in view of that, your Honor, we believe that the basic policy is clear, the endorsement is clear, it has been stipulated that it is a duck farm, and we therefore ask for a decree and a judgment that there is no property damage coverage afforded under the insurance contract or any of its parts to the duck farm premises and to the business activities of the defendant, Dr. Ivey.

Mr. Chamberlin: May it please the Court, I would like to review the policy.

The policy is entitled, your Honor, "Comprehensive General Automobile Liability Policy".

Now, that is what it says on the outside. That is what it says on the first line when you get inside the policy. You then see the coverages specified. Coverage A is entitled "Bodily injury liability". Coverage B is entitled "Property damage liability, automobile". You immediately see that there is more in the policy than just automobile liability insurance.

Now, when you turn to coverages A and B in the insuring agreements of the policy, you find that coverage A is as follows. I will read it all:

"Coverage A. Bodily injury liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

"Coverage B. Property damage liability—auto-

mobile. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile."

Now, it will immediately be obvious to your Honor that so far as bodily injury liability is concerned, the insured had, under coverage A, full protection for that liability. He didn't need any endorsement to bring into the policy any further liability for bodily injury.

Now, we find in the policy one of the exclusions to that bodily injury liability is malpractice. There was an endorsement put on for malpractice. It wasn't put on for any other activity.

Now we come to this endorsement, endorsement No. 1, which is entitled at the top, "Comprehensive". This endorsement does not apply to automobile liability, it states, and it says, "Individual as Named Insured, including personal liability coverage for named insured and family."

Now, when we get to the coverage under this policy, your Honor, it is not divided into property injury liability; it is not divided into property damage liability, it is a coverage for liability. It says, "Liability coverage."

When you take that term, your Honor, "Liability coverage", it is broad enough to include bodily injury liability, it is broad enough to include property damage liability. We find that for this liability coverage the limit of liability is $300,000 for each

occurrence. It doesn't speak of an accident, as the other policy, the first that I read to your Honor, stated, but it applies to "each occurrence."

Now, right after saying "liability coverage", the policy states, "The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business of which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits."

Does your Honor understand that? May I read it again?

"The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business of which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits."

Now, I say that is double talk, your Honor. It refers to business, the conduct of a business and the activities of a business, and then proceeds to say, "except which are ordinarily incident to non-business pursuits."

Right off the bat you have an ambiguity.

Then it defines "business":

"Business includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental by the insured other than (a) the insured's residence if rented occasionally or if a two-family dwelling usually occupied in part by the insured or (b) garages and

stables incidental to such residence unless more than three car spaces or stalls are so rented or held."

Now, the liability coverage, and the term, as we see, includes bodily injury liability and property damage liability, then having defined the word "business", certainly this duck club comes within that definition of the word "business".

Now, we have this: "except as it applies to the conduct of business of which the named insured is the sole owner, the policy is amended as follows."

Now, in the first part of the policy there was no provision as to the conduct of these businesses by the insured, so that what follows after that is not excluded, it is included. It says, for instance, "insuring agreement 1."

Now, insuring agreement 1, your Honor, of the policy was the one as to bodily injury liability and property damage liability and products liability. That insuring agreement is replaced by this personal liability coverage, which extends to bodily injury and property damage liability, and it here defines what liability coverage is:

"That the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof."

Now, there you have an express agreement in

this endorsement, your Honor, to pay all property damages.

Now, they go along a little further, and we come now at the end of this endorsement where they define the word "premises". There is one provision in there as to vacant land—vacant land owned by the insured.

Now, this duck club that we have in mind, it is vacant part of the year. Your Honor knows that in duck hunting there is a limited season for it, one or two months at the most, and the balance of the year such property is vacant. It may have these barrels imbedded in the ground, but for all intents and purposes that property is vacant.

Now, that is one reason why we had Mr. Knudsen on the stand. He said that when he went to the insurance company and discussed getting this insurance, the question came up, wasn't this vacant land, and that so far as that was concerned there was a question in the minds of the parties when the insurance was written whether this was vacant land or whether it was occupied land. They discussed it because they wanted coverage.

Now, there is the face of the policy, your Honor, which has a lot of double talk in it. We have to be frank with these matters. Where insurance policies are concerned, it is rarely that you ever get one but what the language can be twisted this way and twisted that way, and so often it is attempted to be twisted by the company against the insured.

Now, the insured doesn't know these terms. When the policy comes to him he has to take it as he

finds it. He has been assured ordinarily by a broker or the agent of the company of the coverage he is getting. When the policy comes, your Honor, he says, "Is that what I asked for?" And they say, "Yes."

It is for that reason that the law is not particularly against, it is not particularly harsh on an insured who doesn't read his policy. The cases in this state, many of them, hold that the insured need not read his policy, and that if he doesn't read it it is not something that can be held against him, probably for the reason that if he did read it he wouldn't be able to understand it.

Here we have, then, covering in form and in language which covers both bodily injury liability and property damage liability, and which by its terms would cover this duck club.

The policy recites that a premium was paid, and we have to ascertain what that premium was for. We want to get what were the surrounding circumstances at the time the contract was made. You then find that, contrary to the words of the insurance company in this case, it was paid and accepted, a premium, for the very coverage which it now repudiates.

How do we find that, your Honor? We find that, in the insurance company's own documents, documents which emanated from the insurance company, which they gave to their agent—the agent representing them. We find this, that all these items which were admittedly paid for property damage, because we have, as your Honor knows, the exten-

sion, the daily report and extension survey, and so forth, in many cases where a premium was paid and it was put into the B.I. column for property damage, and property damage was written as the conclusion. So that in many instances property damage under that particular clause was granted by the insured and paid for.

Now, your Honor will find that all the premiums that were paid for this property damage insurance, on the face of the policy are recited as a premium in this bodily injury liability on page one of the policy. In other words, they admittedly accepted a premium for bodily injury and property damage liability, but when they put it on the face of the policy as part of the premium it was simply assigned to bodily injury liability.

That was explained, your Honor, by Mr. Knudsen. He explained very carefully that all personal liability insurance, where you are insuring a man against all liability that the law may cast upon him personally, you have to include property damage, you have got to include bodily injury liability. And for that reason where you call it personal liability insurance, it doesn't matter what column you assign it to, whether you assign it to property damage or bodily injury, because the term "personal injury liability" or "personal liability coverage" includes both of those terms.

I think that was shown particularly by Mr. Knudsen's testimony as to why a premium was charged for this duck club. If it was only bodily injury liability, your Honor, under the terms of

the policy before this endorsement was put on it wouldn't have been necessary to charge any premium. It would have been included in the general liability. But as it was going to be for property damage, it was necessary, because the company thought there might be considerable hazard there—duck club; it sounds like somebody might shoot somebody or hurt somebody—they had to pick out a premium.

They negotiated a flat charge, as is shown in the statements, the daily report, and so forth, extension survey. It shows that a charge was made for that coverage, a flat charge, but it was assigned to a rating which would not have had a flat charge.

In other words, under the rating that it was assigned to they would have taken so much for this space and so much for that space. In other words, if it were ten acres it would be more than if it were only one acre. It was charged by the quantity.

In this case it was just a flat rate that was charged and assigned arbitrarily to that particular rating because it used the word "club".

As your Honor will recall—well, I will read what that particular rating was. It referred to sororities and fraternities. I will read that to your Honor:

"Duck club—" the printing is very difficult, your Honor. "——rated as club NOC", which means "not otherwise classified"—"including lodges, fraternal orders and sororities; excluding the handling or use of the existence of any condition in goods or products handled after the insured has relinquished for possession thereof to others."

Now, it was put under that classification, your Honor, and it was put under there because, as Mr. Knudsen explained, they were going to make a charge for this particular property damage coverage on this property and for that reason they picked out this and arbitrarily put a $40 premium upon it.

I don't think I need to go any further than that, your Honor, because it is very apparent that they were paid for the coverage which they repudiated, and that their own statements, the statements on their own documents that emanated from them, the statements of their agents show that that charge was made and paid by the doctor for the coverage they now repudiate.

Mr. Taylor has stated that your Honor can't go behind the policy. Now, that is all nonsense. Time and again in the laws of California — and your Honor is to decide this under California law because the case comes before you on a diversity situation, in which event the law of the forum controls. Time and again under the cases in this state evidence has been admitted to show what the insured paid for and what he was promised.

If I go to your Honor as an insurance agent and say, "I want full coverage", you say, "You are going to get full coverage", and you then hand me a policy, I can assume that I have got full coverage. If later on it develops that I haven't, I can put on the testimony of the agent and show he promised it.

We can cite cases to your Honor. I don't intend to cite them at this point, but they are to the ef-

fect that we can put in testimony to show what was promised and what was given. We can show by the laws of the state of California that under such circumstances, if the insurance company takes the premium and repudiates it, it is estopped from saying that it didn't write such coverage.

We can give your Honor California cases where it is repeatedly held in situations such as this that the policy is ambiguous. That even where it isn't ambiguous, the court has the right to take the surrounding circumstances to find out what the actual intention of the parties was. We have cases to that effect.

We have cases also, your Honor, to the effect that where a policy has been renewed from time to time, that the renewal is assumed to be upon the terms and conditions that were first agreed upon, except to the extent that any differences appear in it. But if there is not any request for differences, no matter what the policy recites, the cases in California hold that the intention was to have the final policy the same as—rather, the renewal policy the same as the earlier policy, and if there is any question in that regard the extrinsic evidence is permissible to show that.

The cases in the state of California, your Honor, are very liberal towards insureds. They feel that everything should be strained to give the insured insurance. That where the company comes in, as they do in this case, and says that the provisions of their policy so provided that the insured had no property damage insurance on these various busi-

nesses of his, in one breath say that and in the other breadth admit he has property damage insurance in all respects but in two respects, one with respect to his office, where it was specifically excluded and the premium was based upon that exclusion, and upon the properties where it was left open.

They say that he had, under a policy which they interpret as not giving him any property damage insurance, they say that he does have property damage insurance in all respects except in respect in which we are litigating here.

Now, I didn't cite these cases to your Honor by title and volume because your Honor very kindly said that we could write points and authorities, and I think in the points and authorities we can demonstrate to your Honor that the evidence which counsel has moved to strike is competent, legitimate evidence, evidence that a court welcomes so that it may be put in the same situation as the unfortunate insured here where they are disputing that he has any insurance.

Thank you, your Honor. May we have ten or fifteen days?

The Court: Let counsel close, first.

Mr. Taylor: Your Honor, Mr. Chamberlin has stated that they admit that the duck club comes within the terms of the definition of "business".

Now, on the endorsement it couldn't be more clear, your Honor: except as it applies to the conduct of a business of which the insured is the sole owner.

And it is also stipulated in this transcript that he is the sole owner. So except as to the business in which he is the sole owner, the policy is amended.

What could be more clear than the intent that as to the duck club and as to the office, the policy is amended? Except as to the business, the policy is amended.

So the amendment does not apply to the business. And we admit that the amendment covers both property damage and personal injury liability, but it covers it for personal acts, your Honor. It does not cover Dr. Ivey for his business activities, and it is under Roman numeral II, just above the insuring agreements, and nothing could be more clear and more plain and more unambiguous.

Mr. Knudsen has received these extension schedules and these surveys, your Honor, for over a period of three years, and I think every single one of them on the extension schedule shows—and this is Plaintiff's Exhibit 2—that for the first four items under the column "Estimated premium", they had certain figures in the column B.I., which stands for bodily injury. And then by the side of each one of those, under the column P.D., it had in capital letters INCL, which means "included".

So that the estimated premium for these first four items on the face of the extension schedule shows that property damage was included.

The fifth item and the sixth item, your Honor, are the duck club and the Grand Avenue business locations. Opposite the premium for the duck club —the duck club premium appears in the bodily in-

jury column — there is nothing in the property damage column. The word "INCL" is not in there.

Counsel would have the Court construe this extension schedule by adding the words "INCL" in the property damage column under "estimated premium".

That is what they say is the ambiguity.

It is not contended that on some of these extension schedules the word "INCL" was included and on others was left off, so that when the final one was presented, by mistake it was left off. There is no such contention. Every single extension schedule that Mr. Knudsen received failed to have the word "INCL" in the property damage estimated premium column. They say that because it had a flat charge in front of it, that flat charge is an inclusive and all-inclusive expression.

But Mr. Havner explained that on page 42 of the transcript. It begins on page 41, at the bottom of the page. This is from the cross examination by Mr. Bacon, talking about flat charge:

"But it includes property damage, does it not, also?"

To which Mr. Havner said, "That expression 'flat charge' applies only to the amount of premium charged; it has nothing to do with the rates."

In other words, it could be a flat charge by property damage, it could be a flat charge by personal injury, it could be a flat charge for both. It could be. But the expression applies only to the amount. The flat charge means that there will be no in-

crease in that particular charge for that particular policy for that particular year.

Now, we have cases to the effect, your Honor, that it is incumbent upon the insured to read his policy. After all, the insured is a businessman. In this case he is an educated man, a very well educated man. He is a doctor. He was engaging in other business enterprises. There are cases in California which hold the insured responsible for anything that may happen to him by reason of his failure to read his policy.

It is admitted by the defendant that they had no property damage on the office premises on Grand Avenue in Oakland. Certainly, on the extension schedule there is nothing. Nothing appears in the property damage column. There was no intent to secure *of* pay for or have property damage coverage on the business property in Oakland. And by the same token, there was no intent to secure, ask for, pay for or have property damage coverage on the business activities and the business pursuits at Willows.

Now, isn't it strange, your Honor, that when an agent comes in and takes the position, all through the time prior to trial, at least, that the Willows property was non-business property? Thinking that the Willows property was non-business property, he would assume from the endorsement that it was automatically covered, being non-business property, and we would agree, your Honor, if the Willows property was non-business property Dr. Ivey would

have property damage coverage as well as personal injury.

But now it comes along and it is shown that the property at Willows was business property, was a business enterprise. They are now trying to crowd it under the "Individual as Named Insured" endorsement, and I think it is a very feeble attempt to do so because it has been stipulated as a business property, and the endorsement does not apply to it.

It was necessary, of course, to pay a bodily injury premium both for the business property at Oakland and for the business property at Willows. And the estimated premium on both of those pieces of property is shown under the B.I. column in the estimated premium of the extension schedule, Plaintiff's Exhibit 2.

That is what that includes. It includes the bodily injury premium and the premium for bodily injury coverage, and that alone. And we renew our prayer that the Court find that the policy and endorsement be construed as they say on their face, without any ambiguity, that there was no property damage coverage for business activities, and that Dr. Ivey did not have any, did not pay for any, and therefore the lawsuit which was handled in Colusa County does not come within the confines of the policy that was issued.

Thank you, your Honor.

The Court: Now, when will you have your memorandums in?

Mr. Chamberlin: Whenever your Honor thinks we should have. Ten days? Fifteen days?

The Court: No, no, as soon as possible so that I have this matter in mind, and I want to dispose of it.

Mr. Chamberlin: By next Monday?

Mr. Taylor: Does your Honor want us to put in our memorandums separately, or will it be on written briefs where we put in the first one?

Mr. Chamberlin: Well, if each fellow gets to answering the other one, there is no end to briefs. I would just as soon we each write them independently, if that is agreeable to your Honor, each one state his position in his brief without trying to answer all the arguments of the other counsel.

The Court: Well, you answered those this morning, all that you could think of, at least.

Mr. Chamberlin: Yes, your Honor. Of course the plaintiff generally opens and closes. Do you wish to do that?

Mr. Taylor: I will leave it up to his Honor. If your Honor wishes us to file the opening brief, to be followed by Mr. Chamberlin's, and then we respond, we would be willing to follow that procedure.

The Court: Two, five and five?

Mr. Chamberlin: That will be ample, your Honor.

Mr. Taylor: The opening one would be in in two days?

The Court: Well, do you want further time?

Mr. Taylor: As a matter of fact, I was expecting to start a trial in Oakland today, but it has

been put over. If we could have further time, we would appreciate it.

The Court: Five, five and five? Is that agreeable, gentlemen?

Mr. Chamberlin: Yes, your Honor.

The Court: I may suggest to you now, you had better work hard on your briefs.

Mr. Chamberlin: We always do, your Honor. I have the cases and it will be very simple to put them in form.

The Court: Now, in the event of an appeal, you must in making your motion to strike quote the testimony, and you may do that after judgment is rendered if that is agreeable to both sides.

Mr. Chamberlin: Certainly, your Honor.

Mr. Taylor: Certainly.

The Court: I want to put both sides in equal position, so that when you go forward you won't have anything to complain about.

Mr. Chamberlin: We are agreeable on everything except the end, your Honor.

The Court: Well, I will do the best I can.

Mr. Chamberlin: Thank you, your Honor.

The Court: So protect your record, gentlemen, and I wish both sides good luck.

The Clerk: December 18th for submission.

[Endorsed]: Filed December 11, 1956.

[Endorsed]: No. 15601. United States Court of Appeals for the Ninth Circuit. Everett D. Ivey, Appellant, vs. United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford, Connecticut, a corporation and Transcontinental Insurance Company, a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 20, 1957.

Docketed: June 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15601

EVERETT D. IVEY, Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Appellees.

CONCISE STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF THE RECORD WHICH IS MATERIAL TO THE CONSIDERATION OF THE APPEAL RULE 17(6)

A concise statement of the points on which appellant intends to rely is as follows:

1. The District Court erred in finding (Finding 11) that "the words 'Flat Charge' appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium."

2. The District Court erred in finding (Finding 12) that "defendant, Everett D. Ivey, did not purchase property damage coverage for either the Duck Club or the office business property."

3. The District Court erred in finding (Finding 13) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property."

4. The District Court erred in finding (Finding 14) that "the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation and maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey."

5. The District Court erred in finding (Finding 15) that "there is no ambiguity in the said Comprehensive Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement."

6. The District Court erred in concluding as a matter of law (Conclusion 1) that "defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties."

7. The District Court erred in concluding as a matter of law (Conclusion 2) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties."

8. The District Court erred in concluding as matter of law (Conclusion 3) that "the Named Insured Endorsement of policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner."

9. The District Court erred in concluding as a matter of law (Conclusion 4) that "plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance."

10. The District Court erred in concluding as a matter of law (Conclusion 5) that "plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint."

11. The District Court erred in concluding as a matter of law (Conclusion 6) that "there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement."

12. The District Court erred in concluding as a matter of law (Conclusion 7) that "the said insurance policy and endorsement speak for themselves."

13. The District Court erred in concluding as a matter of law (Conclusion 9) that "plaintiffs are entitled to a judgment declaring that the policy and endorsement do not provide for property damage insurance coverage to defendant, Everett D. Ivey,

for occurrences arising out of the operation and maintenance of the Duck Club property."

14. The District Court erred in concluding as a matter of law (Conclusion 10) that "judgment be entered in favor of plaintiffs and against defendant in said action with costs."

15. The District Court erred in entering judgment for plaintiffs.

16. The District Court erred in decreeing that "United National Indemnity Company Comprehensive General Automobile Liability Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property."

17. The District Court erred in decreeing that "judgment is rendered in favor of plaintiffs, United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford, Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and against defendant, Everett D. Ivey, on the cross-complaint."

18. The District Court erred in decreeing that plaintiffs recover costs.

19. The District Court erred in granting the motion of plaintiff United National Indemnity Company to strike testimony from the record.

20. The District Court erred in denying defendant's motion for new trial.

Appellant Hereby Designates the Entire Record as Material to the Consideration of the Appeal.

Dated: San Francisco, July 2, 1957.

ALEXANDER, BACON & MUNDHENK,

/s/ HERBERT CHAMBERLIN,
Attorneys for Appellant.

Certificate of Mailing Attached.

[Endorsed]: Filed July 3, 1957. Paul P. O'Brien, Clerk.